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ABSTRACT

This is the 16th publication in an annual series intended to provide New Jersey board members and administrators who are representing their district in negotiations with the latest information on legal developments affecting negotiations, practical advice on bargaining strategy and tactics, and a handy source of reference for important case law. In this issue, the first feature article discusses the scope of negotiations, discipline, and agency shop, along with recent federal developments affecting the bargaining process, such as the Consolidated Omnibus Reconciliation Act of 1985 and the court-ordered extension of the Fair Labor Standards Act requirements to state and local government employers. The next article discusses the effects of New Jersey's Teacher Quality Employment Act on labor relations within the state. Following this are articles on the following topics: pitfalls of comparability data, the respective roles of the union and supervisory units at the bargaining table, and determination of the appropriate supervisory bargaining unit. The publication concludes with an annotated list of recent legal decisions affecting negotiations, a selected bibliography, and a revised critical analysis of the sample agreement provided for its members by the New Jersey Education Association. (TE)

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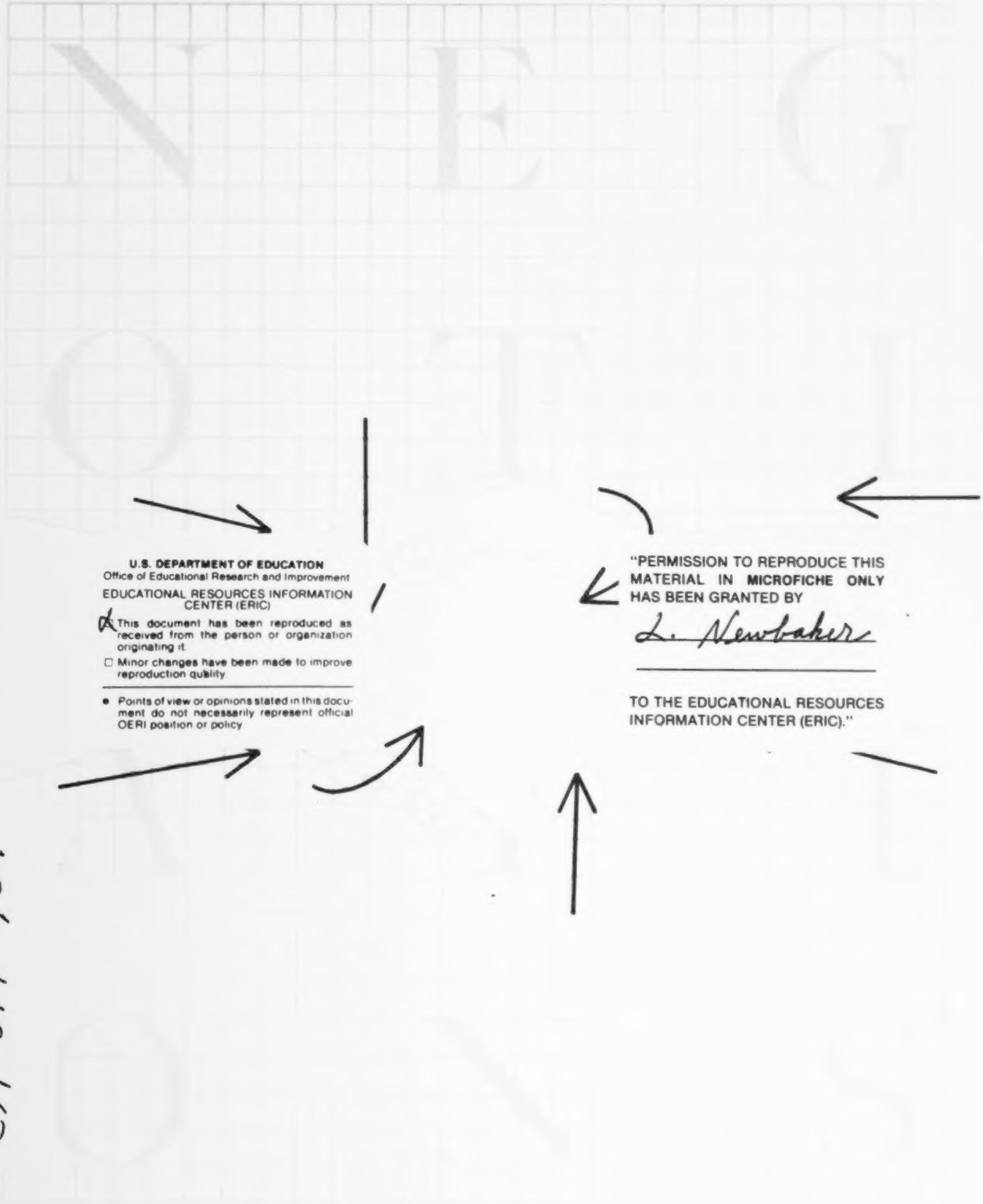

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NEGOTIATIONS 86-87

NEGOTIATIONS · 86-87

Curt Wary · Esther R. Strassman · Kathleen Vogt · Dennis Schmidt

A PUBLICATION OF THE NEW JERSEY SCHOOL BOARDS ASSOCIATION
P.O. Box 909, Trenton, New Jersey 08605-0909

New Jersey School Boards Association
NEGOTIATIONS '86-'87
By Curt Wary, Esther Strassman, Kathleen Vogt, Dennis Schmidt

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INTRODUCTION: Resources for Bargaining

Negotiations* 1986-87** is the sixteenth publication in the ***Negotiations series. From the outset, these publications have provided board members and/or administrators who are representing their district in negotiations with the latest information on legal developments affecting negotiations, practical advice on bargaining strategy and tactics, and a handy reference source for important case law. In this issue, feature articles discuss the scope of negotiations, discipline, agency shop, recent federal developments impacting on bargaining, the Teacher Quality Employment Act, comparability data, the role of the union and supervisory units. Finally, the publication concludes with the revised analysis of the NJEA sample agreement.

Other excellent resources are prior issues in the annual Negotiations series of publications. Feature articles in earlier editions include:

Negotiations '85

- An Update: Agency Shop, Discipline, and Bargaining Unit Determination
- Statutory Holidays
- Bargaining Parameters
- Negotiating with Comprehensive Units
- Packaging

Negotiations '84

- An Analysis of the PSA Model Agreement for Supervisory Personnel
- Bargaining with Principals and Supervisors
- A Board Policy on Negotiations
- The Many Dimensions of the Merit Pay Issue
- Negotiating Salary Guides
- Collective Bargaining and Educational Excellence

Negotiations '83

- Personal Leave
- Payment for Unused Sick Leave
- Bargaining Units: Consolidation, Severance, and Additions
- Salary Differentials or Where Have All the Science and Mathematics Teachers Gone?
- Teacher Evaluation: The Current State of the Law

Negotiations '82

- Teacher Salary Guides: The State of the Art
- Communicating with the Public During Negotiations
- Basic Bargaining Errors
- The Rituals of Bargaining

Negotiations '81

- Agency Shop Negotiations
- An Analysis of Selected Contract Clauses (Recognition, Transfer Procedures)
- Opening Schools During a Strike

Negotiations '80

- An Analysis of Selected Contract Clauses (Sabbatical Leave, Tuition Reimbursement)
- The Use of Professional Negotiators
- Employee Relations in the Context of the Labor Agreement

In addition to the ***Negotiations*** series, your Association publishes a wide range of books and periodicals which have proven to be invaluable sources of information:

The most comprehensive guide to school district labor relations is ***Collective Negotiations,*** Volume 5 in the School Board Library Series. This book addresses the entire bargaining process from start to finish with special chapters on preparation, tactics, mediation, factfinding, and strikes. It provides a fine introduction to the process for the new board negotiator, and an excellent review for the experienced team member.

The Public Employment Relations Law, Volume 6 in the School Board Library Series, describes in layman's terms all of the powers of PERC and all the rights and obligations the bargaining law grants to school boards, unions, and school employees. Unfair practices, impasse procedures, injunctions and the scope of negotiations are explained in detail. A completely revised edition should be available later this year.

Administering the Negotiated Agreement, Volume 7 in the same series, is a comprehensive guide to grievance handling and contract administration. It is also very useful in negotiations because of its careful discussion of such topics as grievance procedures (with sample language), rules for contract language interpretation, and the legal framework for grievances and arbitration.

Costing Out the Labor Agreement is a step-by-step guide to calculating the true cost of salary and benefit proposals during negotiations. This publication describes the "how

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to" of scattergrams, salary guides, percentage v. flat dollar increases, and costing multi-year settlements.

Extensive information on comparative bargaining data is available through ***An Analysis of Teachers' Contracts in New Jersey 1985-86/1986-87*** which contains salary and fringe benefit data from over 500 school districts and analyzes trends in union demands across the state.

The "Labor Lookout" column in ***School Leader*** provides timely information and practical advice on a wide range of issues involving collective bargaining. Among the topics addressed in the past year were tentative agreements, salary guides, the Fair Labor Standards Act and good faith bargaining.

Finally, ***Negotiations News/School Law Reporter*** is a bimonthly update on PERC decisions, arbitration awards, and court cases that affect collective bargaining and school operations.

These publications have proven to be valuable and handy sources of information for use in preparing for negotiations and at the bargaining table. However, beyond written instruction and advice, there are a number of additional sources for information and assistance. Most notably, the Association conducts a wide variety of training programs throughout the year which are specifically tailored to different levels of experience and expertise. Also available on cassette tape is a clause-by-clause analysis of your labor agreement with suggestions on possible board proposals for subsequent negotiations. Finally direct phone assistance is no further than (609) 695-7600.

Good luck in negotiations!

Curt Wary

Curt Wary
Director of Labor Relations

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SCOPE OF NEGOTIATIONS

Since the enactment of the Employer-Employee Relations Act in 1968, the Public Employment Relations Commission (PERC), the courts and the Legislature have all played significant roles in determining the scope of negotiations under the Act. Much to the frustration of practitioner and layman alike, the scope of negotiations is constantly in a state of flux as PERC and court decisions as well as legislative action define and redefine what may be bargained. For example, PERC issued over 50 scope decisions during the 1985-86 school year alone.

In recent years, however, this continuing redefining of the scope of negotiations has been marked by evolutionary or incremental change as opposed to radical alterations. Therefore, it becomes somewhat easier to explain and understand not only the scope of negotiations as it currently exists but also to trace key PERC, court and legislative developments. It should be remembered that, although PERC has primary jurisdiction over questions concerning negotiability, its rulings may be appealed to the lower courts and the state Supreme Court. The Supreme Court has issued several key decisions providing significant shape and structure to the boundaries of negotiability.

In three landmark decisions,[1] the Supreme Court held that the scope of negotiations in the public sector must be more limited than that in the private sector because the public employer is the government which has special responsibility to the public. The Court maintained that the foundation of our democratic system would be endangered if matters of governmental policy were left to the process of collective negotiations where citizen participation is precluded. Thus, the Court concluded that matters of public policy are properly decided, not by negotiation and arbitration, but by the political process.

Consequently, the Supreme Court in *Ridgefield Park* interpreted the Act as providing only two categories of negotiations for most public employees: mandatorily negotiable terms and conditions of employment and illegal, nonnegotiable matters of governmental policy.[2] A three-prong test of negotiability, enunciated in *Local 195*, has provided guidance to PERC and the courts in making scope determinations. To be negotiable, a subject

- must intimately and directly affect the work and welfare of public employees;
- must not be preempted by a statute or regulation which speaks in the imperative and leaves nothing to the discretion of the public employer; and
- must not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

All three of the above criteria must be met before a subject can be negotiated. Thus, if a subject intimately affects employees' working conditions, but does not meet the other two criteria, it is nonnegotiable.

In its *Ridgefield Park* decision, the Supreme Court also held that the scope of arbitrability is tied to the scope of negotiability. Thus, only negotiable terms and conditions of employment could proceed to arbitration. The Court, in its *Bernards Township*[3] decision, expanded that concept. It reiterated that if management prerogatives were permitted to go to binding arbitration, the effect would be to delegate governmental policy-making to an individual not accountable to the public. However, disputes arising out of the application of managerial prerogatives could be submitted to *advisory arbitration* as this type of decision does not result in a final determination of public policy. Consequently, a provision in a negotiated grievance procedure calling for advisory arbitration of disputes over the application of managerial prerogatives is itself a negotiable term and condition of employment. The Court in *Bernards Township* described the advisory arbitration process as protecting employees' interests without encroaching on the employers' authority to set governmental policy.

The Court has issued these critical decisions within the framework of the Employer-Employee Relations Act. In so doing, it has indicated that the political process is the proper mechanism for changing that framework. Thus, the Legislature has an important role in redefining the scope of negotiations. An example of this is the passage of a bill in 1980 amending the law to permit negotiation over Agency Shop. This amendment spurred much activity in the courts questioning the constitutionality of using representation fee funds for lobbying activity and debating the constitutionality of demand and return systems.[4]

Another example of legislative activity impacting on the scope of negotiations is the 1982 legislative amendment to the Act. This was a result of the judicial determination that a public employer's right to discipline its employees could not be the subject of negotiation or arbitration.[5] The statutory amendment specifically established the negotiability of disciplinary review procedures, as long as the procedures agreed upon by the parties do not replace and are not inconsistent with alternate statutory appeal procedures and do "not provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service law." Thus, the scope of negotiations was legislatively redefined.

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[1] *In the Matter of Local 195, IFPTE, AFL-CIO v. State of New Jersey*, 88 *N.J.* 393, (1982); *Paterson Police P.B.A. Local No. 1 v. Paterson*, 87 *N.J.* 78 (1981); *Ridgefield Park Education Association v. Ridgefield Park Board of Education*, 78 *N.J.* 144 (1978).

[2] Negotiations involving police and firefighters are controlled by a specific statute which specifically provides for a third category of negotiable topics, termed "permissive subjects." The Court in *Paterson, supra*, restricted the permissive category to preclude negotiations on matters which would place "substantial limitations" on a public employer's policy-making authority.

[3] *Bernards Township Board of Education v. Bernards Township Education Association*, 78 *N.J.* 311 (1979).

[4] *Robinson v. New Jersey*, 741 F.2d 598 (3d C. 1984).

PERC has since applied the discipline amendment in cases involving both nonteaching and teaching staff personnel. In *East Brunswick*[6], PERC found that the withholding of increments for nonteaching staff members are disciplinary determinations which may proceed to binding arbitration. In a recent *Holland Township*[7] decision, the Commission held that in reviewing alleged disciplinary disputes involving teaching staff members, it will determine, based upon the facts of each case, whether the dispute predominantly involves an evaluation of teaching performance or a disciplinary sanction. If the case involves an evaluation, it will be restrained from binding arbitration; however, if the case involves a disciplinary determination, it will be permitted to proceed to binding arbitration. (For a further discussion of recent developments regarding discipline see "Update: Discipline, Agency Shop, C.O.B.R.A. and F.L.S.A." on p. 12.)

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[5] *City of Jersey City v. Jersey City Police Officers' Benevolent Association*, 179 *N.J. Super.* 137 (App. Div. 1981), cert. denied 89 *N.J.* 433 (1982); and *State of New Jersey v. Local 195, IFPTE and Local 518, SEIU*, 179 *N.J. Super.* 146 (App. Div. 1981), cert. denied 89 *N.J.* 433 (1982).

[6] *East Brunswick Board of Education and East Brunswick Education Association*, PERC No. 84-149, aff'd. App. Div. Docket No. A-5596-83T6 (March 19, 1985), certif. den. ______ *N.J.* ______ (1985).

[7] *Holland Township Board of Education and Holland Township Education Association*, PERC No. 87-43, 12 *NJPER* 17316.

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Mandatory Topics

As of January, 1987, court decisions and PERC determinations have held that the following are *mandatory topics of negotiations*. Remember—you must negotiate these issues but you do not have to concede unless you wish to do so.

Advisory arbitration for the application of management prerogatives to individual employees
After school teacher-only workshops
Agency shop
Commencement date of negotiations if earlier than date set by PERC
Committees on nonnegotiable topics that have merely advisory authority
Compensation
Discipline procedures consistent with statutes
Duty free lunch
Evaluation procedures that do not contravene statute or administrative code
Fair dismissal procedures
Fringe benefits, including benefits for RIFfed teachers if incorporated into the contract
Grievance procedures
Hiring procedures
Holidays
Holdback of salary
Hours
Insurance, including disability income
Job security (for employees not covered by tenure)
Leaves of absence
Length of the collective bargaining agreement
Management rights clause
Maternity and child-rearing leaves
Merit pay
No-strike provision
Payment for unused accumulated sick leave
Past practice
Personal leave
Personnel file, access to
Physical and mental exam, beyond statutory authority
Physical facilities and working conditions, smoking in teachers' lounge
Posting procedures
Preparation periods
Promotion procedures
Reduction in force, notice provisions
Release time
Representation for teacher conferences, other meetings
Rules, change of
Sabbatical leaves
Safety issues
Salary guide, initial placement, credit for experience
Shifting unit work from unit employees to employees outside the unit (specifically distinguishable from the nonnegotiable topic of subcontracting)
Sick leave, above the statutory minimum
Summer session, procedures for filling positions
Teacher-pupil contact time
Teacher rights clause
Teaching periods, number of
Transfer and assignment procedures
Union business, time off for, use of prep period for
Tuition reimbursement
Vacations
Work load
Workday, length of
Work year, length of[a]
Zipper clause

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[a] This is generally mandatory for public employees; however, for teachers it is mandatory only to those days in excess of the 180 minimum required for state aid.

Illegal Topics

The following items have been determined to be *illegal topics of bargaining because they involve matters of educational policy or inherent management prerogatives:*

- Absenteeism and tardiness policies
- Academic calendar
- Affirmative action plans
- Application of evaluation criteria
- Assignment
- Audio-visual equipment, use of
- Budget formulation
- Class size
- Contact time for students
- Curriculum
- Decision to assign bus, cafeteria, corridor and playground supervision
- Decision to reschedule snow days in teacher vacation period
- Decision to go to split sessions
- Dress code, adoption of
- Evaluation, advance notice of observation and who evaluates
- Extracurricular activities, assignment of
- Facilities relating to the education process
- Impact[*] of nonnegotiable decisions
- Instructional materials
- Lesson plans, format of and scheduling of submission
- Number of employees and deployment of personnel
- Parent-teacher conference, decision to schedule
- Productivity studies
- Qualifications for employment
- Qualifications for increment
- Qualifications for promotion
- Sick leave, verification of
- Staffing, number of employees
- Student-related issues: discipline, grading, grievance procedure, safety, testing
- Subcontracting
- Supervision, of employees by department chairperson
- Transfer, decisions and criteria
- Use of teacher aides

The following items have been held to be *illegal topics of bargaining because they contravene specific statutes or regulations:*

- Composition of the bargaining team
- Decision to RIF
- Discipline, procedures ending in binding arbitration for employees with protection under the tenure law or other statutory appeals procedures
- Early retirement incentives
- Evaluation criteria
- Extended sick leave
- "If/then" clause
- Impact of RIF on remaining teachers, and on RIFfed teachers
- Maintenance of membership clauses
- Nonrenewals
- Parity
- Pensions
- RIF procedures (such as seniority, recall, and bumping rights for tenure-eligible RIFfed employees)
- Religious leave (paid), if not charged to general personal leave or vacation
- Seniority provisions inconsistent with Title 18A
- Sick leave, unlimited blanket
- Sick leave, use of for other than statutory purposes
- Student grievance procedures
- Sunshine bargaining as a precondition to negotiations
- Withholding of increments

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[*] Impact was declared illegal under *Woodstown-Pilesgrove*. However, PERC has ruled in some cases that certain terms and conditions of employment related to the nonnegotiable decision may be severable from the decision itself, and thus may be negotiated. See, for example, *In re Monroe Township Bd. of Ed.*, PERC No. 85-6, 10 *NJPER* 15224, and *In re Bridgewater-Raritan Regional Bd. of Ed.*, PERC No. 81-35, 6 *NJPER* 11230.

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UPDATE:
DISCIPLINE, AGENCY SHOP, C.O.B.R.A. AND F.L.S.A.

Recently, there have been a number of significant developments at the state and federal level which have impacted on collective bargaining in local school districts. The issues of employee discipline and agency shop were further defined by decisions of the Public Employment Relations Commission (PERC) and the courts. On the federal scene, there was legislative and judicial action involving the continuation of health care benefits for former employees and the application of the federal minimum wage and overtime standards to state and local government employers and employees.

This article will focus on these recent developments and briefly assess their impact on collective bargaining. However, please bear in mind that the issues discussed herein are subject to constant modification. Therefore, it is important to stay abreast of further developments in these areas.

Discipline: The Scope of Arbitrability for Teaching Staff Members

Background In 1982, the Legislature amended the PERC Law to specifically authorize the negotiability of disciplinary review procedures. The amendment provided that these negotiated procedures could end in binding arbitration but required that local agreement:

> *may not replace or be inconsistent with any alternate statutory procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws.*

Litigation over the meaning and intent of the amendment resulted in a body of case law which defined the scope of arbitrability of disciplinary disputes involving certain public employees (see *Negotiations '85*, pp.13-14). By 1985, when the New Jersey Supreme Court denied certification in *East Brunswick Bd. of Ed.* (App. Div. Docket No. 5569-83T6, 3/14/85, certif. den. ______ *N.J.* ______, 1985), the scope of arbitrability for discipline of noncertificated school employees was established. It was clear that, in the absence of a specific statutory appeal procedure under Title 18A to review the particular type of challenged discipline, neither PERC nor the courts would find that the Commissioner of Education's broad and general powers preempted arbitration of grievances involving noncertificated school employees.

It was also clear that PERC and the courts interpreted the withholding of a noncertified employee's increment as a disciplinary determination under the amendment. Disputes over the withholding of a noncertificated employee's increment were not deemed to be statutorily preempted from arbitration since *N.J.S.A.* 18A:29-14 provided an appeal procedure specifically limited to teaching staff members. However, that statutory appeal procedure was seen to bar both tenured and nontenured teaching staff members from bringing disputes over withheld increments to binding arbitration. The arbitrability of other board determinations affecting teaching staff members remained unclear until October 1986 when PERC addressed the nature and arbitrability of letters of reprimand (*Holland Township Bd. of Ed.*, PERC No. 87-43, 12 *NJPER* 17316; *Union Beach Bd. of Ed.*, PERC No. 87-44, 12 *NJPER* 17317; *Lincoln Park Bd. of Ed.*, PERC No. 87-45, 12 *NJPER* 17318).

Letters of Reprimand

PERC has held that not all letters of reprimand constitute discipline. Noting that the amendment to the Act specifically prohibits negotiations over criteria and standards of employee performance, PERC determined that the amendment was not designed to overrule the well-established nonnegotiability and nonarbitrability of employee evaluations. Therefore, PERC ruled that substantive comments relating to teaching performance, designed to improve performance, were evaluative and nonarbitrable.

However, letters of reprimand which contained statements not designed to enhance teaching performance were deemed to be disciplinary in nature. PERC rejected the Board's arguments that the amendment prohibits arbitration of all discipline involving tenured employees; rather, PERC held that, in accordance with the Appellate Division's consistent interpretation of the amendment, arbitration of teachers' discipline is permissible if there is no statutory appeal procedure for the particular type of discipline being challenged. Therefore, PERC concluded that while tenured teachers' dismissals and reduction in compensation are excluded from arbitration because of *N.J.S.A.* 18A:6-10, no statutory procedure excludes disciplinary letters of reprimand from binding arbitration *(Holland Township)*.

Recognizing that there may not always be a precise demarcation between what constitutes an evaluative or disciplinary letter of reprimand, PERC held that a case-by-case review must occur to determine the nature and the arbitrability of specific letters of reprimand. To date, PERC has held that a letter of reprimand that:

- criticized a teacher's rebuttal to an evaluation report is evaluative and nonarbitrable *(Holland Township)*;
- identified concerns about a teacher's method of controlling students as a follow-up to the teacher's professional

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improvement plan is evaluative and nonarbitrable *(Lincoln Park)*;

- criticized teachers' conduct at meetings with supervisors is disciplinary and arbitrable *(Holland Township, Union Beach)*.

Each determination, however, was based on PERC's understanding and interpretation of the facts of each case. It is expected that PERC will continue to review each situation on its own merits and in its own context to establish, on balance, whether the letter in question constitutes an evaluative or disciplinary determination.

Both Holland Township and Union Beach boards of education have appealed PERC's decisions. As of this writing, neither case has been heard by the Appellate Division and, therefore, the current scope of arbitrability of discipline involving tenured teaching staff members may be subject to modification as the appeal process develops. To keep fully informed as to the most recent definition of arbitrability, consult with your board attorney, your negotiations consultant, or the NJSBA's Labor Relations Department.

Summary: Arbitrability of Discipline of Teaching Staff Members

As of February 1987, it has been determined that the parties to local negotiations *may not* agree to submit the following board determinations to *binding arbitration:*

- withholding of increments for all teaching staff members;
- dismissals of tenured teaching staff members;
- reduction in compensation of tenured teaching staff members;
- evaluative letters of reprimand.

As of February 1987, it has been determined that the parties to local negotiations *may* legally agree to submit the following board determinations to binding arbitration:

- disciplinary letters of reprimand.

Current case law obviously does not address every conceivable disciplinary determination which can affect teaching staff members. Unless the courts depart from their consistent interpretation of the amendment, or the Legislature further defines the issue, it is expected that PERC will continue to determine arbitrability by: first assessing whether the employer action is disciplinary rather than evaluative; and then by determining if existing laws provide an alternate statutory appeal procedure for the review of the particular type of discipline in question. For the latest developments in this area, keep in touch with your legal and labor relations resources.

Agency Shop

In July 1980, the PERC Law was amended to authorize negotiations over agency shop. The amendment provided that parties could bargain an arrangement where nonunion members would be required to pay a representation fee, not to exceed 85% of regular membership dues, to the majority representative for services rendered by the local union. The Law also required that representation fees could only be collected if union membership was equally available to all unit members and if the union established and maintained a "demand-and-return" system. A demand-and-return system is a procedure which provides nonmembers with the right to review the amount of the fee and to receive a refund of any portion of the fee which does not represent costs associated with collective negotiations.

The constitutionality of the statute and the rights of nonmembers have been the subject of protracted litigation in both state and federal courts. However, several recent decisions have clarified the status of the Law and the parties' obligations in a contractual Agency Shop provision.

Constitutionality

The constitutionality of New Jersey's statute has been settled. The Third Circuit Court of Appeals reversed a lower court decision to affirm the constitutionality of the Law in *Robinson v. New Jersey and Olsen v. CWA*, 741 *F.*2d 598 (3rd. Cir. 1984). The United States Supreme Court denied *certiorari*, _____ *U.S.* _____, 105 *S. Ct.* 1228, 84 *L. Ed.* 2d 366 (1985).

The New Jersey Supreme Court also upheld the statute's constitutionality in *Boonton Board of Education and Kramer*, 99 *N.J.* 523 (1985). The U.S. Supreme Court again denied *certiorari*, _____ *U.S.* _____, 106 *S. Ct.* 1388, _____ *L. Ed.* (1986).

Rights of Nonmembers: The "Demand-and-Return" System

Decisions in both the state and federal courts have held that implementation of a negotiated agency shop provision must balance the rights of majority representatives to collect legitimate fees with the rights of nonmembers to be protected against the collection of unauthorized fees. *Boonton; Ellis v. Railway Clerks*, _____ *U.S.* _____, 104 *S. Ct.*, 1883, 80 *L. Ed.* 2d 428 (1984); *Chicago Teachers Union, Local No. 1 v. Hudson*, _____ *U.S.* _____, 106 *S. Ct.*, 1066, _____ *L. Ed.* 2d _____ (1986). The courts have held that the necessary balance must be provided through a valid and sufficient demand-and-return system which has the following components:

- the representation fee must be computed annually to reflect the union's actual expenditures in the previous year. The fee cannot be based on a "pure rebate" system which fails to consider the union's expenditures which cannot be charged to nonmembers. Expenditures which are impermissible include funds spent for ideological or political purposes unrelated to negotiations and contract administration as well as the cost of benefits available only to union members. The fee may include the cost of lobbying activities relevant to the occupational interests of unit employees;
- prior to collecting the fee, unions must provide

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nonmembers with adequate, audited information explaining the fee's basis. Such notice must be provided annually and the nonmember must be given sufficient time to register objections before the fee is collected;

- the union must provide nonmembers with notice of a demand-and-return system through which objections can be filed. The demand-and-return system must provide a prompt, uncomplicated appeal procedure to contest the fee and cannot contain features which would inhibit its use. The burden of proof in these proceedings rests with the majority representative;
- the union must establish an escrow account for the amount of the fee that is reasonably in dispute; and
- unresolved disputes must, within a reasonable period of time, be submitted to an impartial tribunal.

New Jersey's impartial tribunal, the Appeal Board, was established by the Agency Shop statute and has reviewed disputed fees. Currently, the Appeal Board is in the process of adopting rules and regulations which are in concert with new case law.

PERC and Agency Shop Disputes

In *Boonton Bd. of Ed.*, PERC No. 84-3, 9 *NJPER* 14199, aff'd. 99 *N.J.* 523 (1985), PERC held that while the Appeal Board has the jurisdiction to review fee amounts and the fairness and fullness of representation fee proceedings, the Commission has unfair practice jurisdiction to determine whether the statutory conditions for collection of representation fees have been met. Specifically, PERC will review allegations that (1) membership in the union is not equally available to all unit employees; and (2) a valid demand-and-return system has not been established and maintained by the majority representative.

PERC has held that an employer commits an unfair practice by deducting representation fees without first ascertaining that the union has established and maintained a demand-and-return system *(Boonton)*. However, under the facts of *District 65, UAW, AFL-CIO and County of Cumberland, Office on Aging,* PERC No. 87-72, 13 *NJPER* 18025, PERC held that the county did not have an obligation to insure the *validity* of the system nor to ascertain that the union provided notice to the employees' of the demand-and-return rights. Yet, PERC significantly noted that it did "not rule out holding an employer liable if a demand-and-return system is so patently illusory that in effect it is no system or if the employer condones a refusal to provide any notice." PERC also held that an employee organization commits an unfair practice if the demand-and-return system was too complex, inaccessible, and slow *(Boonton)*. A demand-and-return system established before the courts' decisions which does not satisfy the new requirements does not constitute an unfair practice but is, nevertheless, currently invalid; accordingly, PERC ordered that the union cease to receive representation fees until it adopted a valid demand-and-return system *(District 65)*.

Implications for Local Boards

Boards of education cannot, and should not, deduct representation fees without first ascertaining the existence of a demand-and-return system. The statutory condition that the system be maintained, and the regulatory requirement that fees be calculated annually, suggest that boards may need to annually verify the existence of a demand-and-return system.

Beyond ascertaining the existence of a demand-and-return system, boards should remain aloof from the union's calculation of the representation fee. PERC has held in *Woodbridge Township Board of Education,* PERC No. 81-131, 7 *NJPER* 12147 and in *Township of Hamilton,* PERC No. 82-121, 8 *NJPER* 13169 that the amount of the representation fee should be set by the union and that public employers should not become involved in disputes over the amount of the fee. Employee challenges to the fees are to be processed through the existing demand-and-return system. *District 65* seems to reaffirm that public employers' statutory obligation is limited to verifying that an appeal system is in place and that employees have been given notice of that system.

Representation fees can only be legally deducted by the employer and legally collected by the union when a demand-and-return system is in place. Some boards of education have reported that their local unions have requested the cessation of agency shop fees until further notice, presumably because of deficiencies in the local demand-and-return system. Boards should honor such written requests but may wish to review the procedures expected for the resumption of the negotiated deductions. Contractual provisions which specify that the fee shall be based on a full membership year and that deductions shall be made in equal payments over the course of the year, may complicate resumption of the deductions. Boards may be well-served to discuss expected procedures with their local unions and their board attorneys.

Recent case law development underscores the importance of including good indemnification language in an agency shop provision (see p. 99). Boards should strive to obtain such language to protect the district from incurring financial liability associated with the administration of this negotiated provision.

The Consolidated Omnibus Reconciliation Act

On April 7, 1986, President Reagan signed into law the Consolidated Omnibus Reconciliation Act of 1985 (COBRA). Consequently, employers with 20 or more employees in a group insurance plan are required to provide continued group health insurance to employees and their dependents when such coverage would otherwise cease. The following is a summation of the Act's critical provisions and the possible impact on school districts and collective bargaining.

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Key Provisions

COBRA requires school districts to continue group health insurance coverage:

- up to *18 months* after an employee's termination (except for gross misconduct) or a reduction of hours so that the employee or dependents no longer meet the eligibility requirements for coverage;
- up to *36 months* for dependents in the event of the employee's death, divorce or legal separation or in the event the child no longer qualifies as a dependent;
- up to *36 months* for dependents after the employee becomes eligible for medicare.

The school district is required to notify employees and the employee's spouse, if any, at the time the law becomes effective. The Act is effective for insurance plan years commencing on or after July 1, 1986, except for plans established by collective bargaining agreements. Where the insurance plan is subject to a collective bargaining agreement, the effective date is January 1, 1987 or the date on which the collective bargaining agreement expires, whichever is later.

The school district must also notify the employee or dependents of the opportunity to continue coverage under the group health plan at the time of the "qualifying event" (termination, reduction of hours, etc.). In turn, the employee or dependent has 60 days after the qualifying event or after receipt of notice, whichever is later, to elect continuation of coverage.

If the employee or dependents choose to continue the health coverage, the school district may charge the recipients up to *102%* of the applicable premium. The 2% surcharge is permitted to allow the district to cover additional administrative costs. *The school district is not required to contribute to the cost of coverage for any employees or dependents electing to continue coverage.*

Impact on School District and Collective Bargaining

At this point, it is too early to determine exactly how, and to what extent, the COBRA Law will influence school district negotiations. Presumably, some local unions will propose to have the school board assume, or contribute to, the cost of the continued coverage. A school board even considering agreement to such a proposal should carefully assess all of the implications including any coverage/cost requirements of the State Health Benefits Commission.

Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) was enacted in 1938 for the purpose of establishing fair labor standards for employment in and affecting interstate commerce. As a result of a 1985 U.S. Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority,* 105 *U.S.* 1005 (1985), FLSA requirements were extended to state and local government employers including school districts. Congress subsequently amended the Act making April 15, 1986 the effective date of applicability to state and local government employers and employees.

Key Provisions

For employees covered by the FLSA, the Act sets the following requirements:

- a minimum hourly wage of $3.35 per hour;
- for hours worked in excess of 40 hours per week, overtime calculated on the basis of 1.5 times the regular rate;
- the substitution of compensatory time for overtime pay but only at the 1.5 rate and with a maximum of 240 compensatory hours (after the maximum is reached, payment must be provided at the 1.5 overtime rate).

According to Section 13 (a)(1) of the Act, any "employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools" is exempt from the provisions of the FLSA. Therefore, school administrators, classroom teachers, counselors, nurses and all other professional certified staff are not subject to the Act's requirements. However, secretaries, cafeteria workers, custodians and all other support staff employed in a school district are covered by the FLSA.

Impact on School Districts and Bargaining

In assessing the bargaining implications of the FLSA, it should be remembered that the Act establishes wage and hourly minimums. Therefore, school districts who have collective bargaining agreements covering eligible employees that provide salary and hourly benefits at the same or a higher level than the Act provides, are bound by the provisions of those locally negotiated agreements. Any change in benefits in excess of the FLSA minimum requirements must be negotiated where such eligible employees are covered by bargaining agreements. However, where school district benefits are below the FLSA requirements, the provisions of the Act would supersede the local agreement.

The imposition of the $3.35 federal minimum wage has had little effect on most school districts in New Jersey. According to NJEA research data for the 1985-86 school year, the state average supportive staff salary was $15,338.[1] (A school employee making $3.35 an hour and working 40 hours per week for 52 weeks would earn $6,968.) Therefore, on April 15, 1986 when the FLSA standards became applicable to school districts, few school employees in New Jersey were receiving less than the federal minimum wage. Regardless, the NJSBA advised school districts to carefully review their payroll to verify that no employees fell below the FLSA minimum salary.

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[1] *NJEA Research: Salaries and Salary Guides For Supportive School Personnel 1985-86;* Bulletin A85-12/August '86, p.5.

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The FLSA overtime requirements have had a more significant impact on local school district operations. While most school districts already provided overtime pay beyond 40 hours per week at the prescribed 1.5 times the regular rate, the Act created other complications. For example, if a school custodian is required to be in the building on weekends or is on a restricted on-call basis,[2] that time must comply with the overtime/release time requirements of the FLSA if it exceeds the 40 hour per week standard. School districts must also now be aware of any "informal additional hours" that employees may be logging in excess of their regular 40 hour work week. A school district that is aware of and permits an employee to regularly work additional time before and after school, may be subject to FLSA overtime/release time requirements. Unauthorized extra hours or time spent at the workplace but not working would be exempt from the Act's provisions.

To date, the extension of the FLSA requirements to local school districts in New Jersey has not dramatically affected district operations. However, school districts are still advised to regularly review current payment and hourly practices to ensure comportment with the Act. It is also strongly suggested that school districts maintain clear and accurate records in case the district receives a challenge under FLSA.

If a school district has a specific question regarding its obligations under the FLSA, it is urged to contact the NJSBA's Labor Relations Department.

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[2] Under the FLSA, on-call time may be subject to overtime/release time requirements depending upon how much the employee's movement is restricted as a result of being "on-call."

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THE TEACHER QUALITY EMPLOYMENT ACT

Negotiations in the public sector are frequently affected and shaped by legislative and judicial determinations. The state's enactment of a policy concerning increased teachers' minimum salaries was not an exception. The Teacher Quality Employment Act (TQEA) has had an unmistakable effect upon many schools' negotiations and upon districts' on-going labor relationships during the 1985-86 and 1986-87 school years. Further, its impact is likely to affect future negotiations.

Provisions of the Law

On September 9, 1985, the Teacher Quality Employment Act was enacted and became immediately effective for the 1985-86 school year. Codified as *N.J.S.A.* 18A:29-5, the TQEA established a minimum salary for all full-time teachers of $18,500 and provided that:

- no salary guide adopted by a board of education for full-time teaching staff members could contain a salary below the state minimum;
- state funding, provided for three years, would be based upon the difference between $18,500 and the district's 1984-85 salary. Thereafter, funding would be in accordance with the recommendations of the Feldman Commission or, if the recommendations were not adopted by the legislature, in accordance with a formula established in the law (see discussion of *Continued Funding* below);
- salaries above $18,500 in an indexed guide (where salaries are calculated on a ratio of the minimum) would not be automatically increased;
- existing negotiated agreements in effect for the 1985-86 school year would not be required by law to be reopened for negotiations; and
- several salary guide provisions of *N.J.S.A.* 18A:29-1 *et seq.* were repealed.

In May 1986, the State Board of Education adopted regulations to implement the TQEA. *N.J.A.C.* 6:20-5.6 established rules to administer the law and clearly specified that districts could only use the state aid received pursuant to the TQEA for the salaries of full-time teaching staff members.

Effect on Negotiations 1985-86/1986-87

The Process The effect of the TQEA upon negotiations was evident even before its enactment. Governor Kean's initiative to seek to improve public education in New Jersey by attracting the "best and the brightest" to the teaching profession, frequently cited by teacher representatives in negotiations during 1985, was interpreted as a call for across-the-board increases in all teachers' salaries and established high expectations for significant salary increases. The well-publicized possibility of an imminent legislated increase in teachers' minimum salaries had a "chilling effect" on many local negotiations during the spring and summer of 1985: some boards and teachers' associations, reluctant to reach a settlement in the midst of an uncertain statutory framework, took a "wait-and-see" approach which retarded the possibilities of local agreement; other parties to negotiations agreed that their local settlement would be subject to renegotiations in the event legislative action changed, and funded, minimum salaries.

Once the TQEA was enacted, the statutory requirement and funding expectations established a new framework for on-going negotiations. Guides negotiated after September 9, 1985 started at no less than $18,500 and tended to be shorter than previously negotiated guides; further, post-$18,500 negotiations dealt with a new issue: the source of funding for teachers' salary increases. Teachers' associations placed claims on the total amount of state aid and vigorously argued that those funds should supplement, and not subsidize, local allocations. The distribution of TQEA monies was an issue in both unfinished 1985-86 bargaining and in beginning 1986-87 successor negotiations.

Salary Increases Anticipated salary increases in all New Jersey districts, whose minimum 1985-86 salaries were below $18,500, were affected by the enactment of the TQEA. Existing agreements were not automatically reopened for renegotiations of salaries above $18,500, but all salaries below the minimum were automatically increased to the mandated level. In addition to these legislated increases, 14% of the state's districts reopened existing guides for negotiations of the distribution of residual $18,500 monies.[1] Although not required by the TQEA, these reopeners were the direct result of the new minimum salary law and occurred because of a mutual agreement, between the board and the local association, in response to the new law. The enactment of the TQEA, therefore, augmented the amount of teachers' salary increases for 1985-86 and 1986-87.

NJSBA analysis[2] indicates that, on a state average, the application of TQEA funds resulted in an additional increase of 1.5% in teachers' salaries in 1985-86. Without

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[1] Vogt, Kathleen, *An Analysis of Teachers' Contracts in New Jersey 1985-86/1986-87*, NJSBA, 1986, p.15. The term "residual $18,500 monies" refers to the difference between the district's 1984-85 and 1985-86 salaries; since state aid is based on 1984-85 salaries, districts with 1985-86 guides in place received more money than necessary to increase their 1985-86 salaries to $18,500.

[2] Ibid, pp.27ff.

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the application of $18,500 monies, the state's average percent increase in teachers' salaries was 8.24%; with the distribution of TQEA funds, the 1985-86 average percent increase rose to 9.7%. Initial 1986-87 results, based on 449 reporting districts, indicate that the state's average local increase was 8.13%, whereas the total increase, including TQEA funds, was 8.76%[3].

Like all averages, the state's mean increase masks the wide variations which occurred among counties and among individual districts. 1985-86 county comparisons indicate that Bergen County experienced the lowest TQEA increase (.40%), while in Ocean County the effect of the law resulted in an additional 3.25% increase in teachers' salaries. A district-by-district analysis reveals that, while a few districts experienced no increases in salaries as a result of the TQEA, others reported additional increases as high as 14%, without the reopening of negotiations.

The wide variations which are demonstrated as a result of the TQEA are not surprising. The impact of the law was anticipated to be uneven throughout the state, as factors including the district's pre-$18,500 minimum salaries and guide structure, the distribution of staff on the guide, as well as the district's response to $18,500 were expected to influence the effect of the law on the district's salary increases. For a full discussion of the variations and patterns noted on salary increases, please consult *An Analysis of Teachers' Contracts in New Jersey 1985-86/1986-87.*

Effect on Labor Relationships

Reopening of Existing Contracts The TQEA specifically insulated existing 1985-86 agreements from an automatic obligation to reopen negotiations. However, the law did not prohibit reopeners and parties to local negotiations were thus free to mutually agree to reopen negotiations.

On September 9, 1985, 78% of New Jersey's districts had a negotiated 1985-86 agreement in place. 14% of the states' districts determined to reopen negotiations to distribute the TQEA funds not needed to bring all teachers to the new state minimum; 64% did not reopen negotiations and escrowed the unused or residual funds for future use for teachers' salaries.[4]

The decision to not reopen negotiations stemmed from a variety of factors including: an absence of a union request to do so since $18,500 funds were insignificant or because successor negotiations were about to begin; a board determination to reject a union request on the basis that distribution would be best handled in the context of successor negotiations or a sense that the district would benefit from a respite from negotiations. Boards' refusals to agree to a union request to reopen were authorized by the TQEA; however, the post-TQEA guide, unaffected by renegotiations, would become a source of irritation to many unions and to the membership.

Existing 1985-86 salary guides could not contain any full-time teachers' salary below $18,500. Therefore, all salaries below the minimum were, by legislated action, automatically brought up to the minimum; traditional differentials based on years of experience and advanced degrees were statutorily eliminated and could be reinstated only through local negotiations.[5] A refusal to renegotiate the 1985-86 guide meant that, for at least one year, teacher compensation would be governed by unfamiliar and non-negotiated rules which conflicted with traditional, well-ingrained concepts of teacher compensation. Therefore, boards' refusals to reopen negotiations led to many union challenges.

Some union challenges were expressed through the filing of unfair practice charges. PERC dismissed allegations that the alteration of the district's 1985-86 guide was an illegal unilateral change in the negotiated 1985-86 salary guide and that boards' failure to negotiate the distribution of 1985-86 "residual monies" constituted an illegal refusal to negotiate. PERC consistently ruled that alterations of salaries below $18,500 was a legislated mandate which preempted local negotiations and that boards were statutorily authorized to not reopen existing 1985-86 agreements.[6]

PERC's rulings clarified some disputed areas but did little to eliminate the conflict and resentment that motivated the initial filing of charges. Dissatisfied unions remained resentful of their local boards' position and boards were similarly resentful of the unions' reactions to their attempts to comply with the new imposed minimum salaries. Labor relationships in many districts were, therefore, strained by the enactment of the TQEA; the existence of remaining unclarified issues will continue to complicate on-going board-union relations.

Although absolutely clear on the issue of 1985-86 reopeners, PERC's rulings were specifically limited to 1985-86 salary guides. To date, the obligation to reopen negotiations for 1986-87 or 1987-88 guides, which are part of multi-year agreements negotiated in the context of 1985-86 guides (e.g., a 1985-88 contract), remains unclear. It is, therefore, expected that conflicting interpretations will continue to produce litigation and to exacerbate existing relationships.

Contract Administration Although the TQEA addressed, and funded, only teachers' minimum salaries, its effect on school districts went beyond the guide's entry-level salaries for full-time staff. The new law raised many questions and the adoption of the Administrative Code, while providing some answers, still left room for conflicting

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[3] *New Jersey Teacher Contracts: Salary and Settlement Data 1986-87/1987-88*, NJSBA, 1987

[4] *An Analysis of Teachers' Contracts, op. cit.*, p.15.

[5] *Point Pleasant Beach Bd. of Ed.*, I.R. 86-20, 12 *NJPER* 17155.

[6] See, for example, *Westwood Regional Schools Bd. of Ed.*, PERC No. 87-31, 12 *NJPER* 17289.

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assumptions and interpretations. For example: were part-time teachers' salaries affected by the law? Was there a statutory requirement to adjust all salaries linked to the guide's invalidated salaries? Were permanent substitutes considered full-time teaching staff members? In the absence of clear guidance, these and other issues, created disputes between the parties to local agreements.

A dispute over permanent substitutes' eligibility for the state minimum salary was submitted to the Commissioner of Education[7] who ruled that these employees were full-time teaching staff members and thus entitled to the benefits of *N.J.S.A.* 18A:29-5. Most disputes, however, were submitted to the district's negotiated grievance procedure.

Some boards of education sought to restrain denied grievances from proceeding to binding arbitration. PERC ruled that the TQEA did not preempt negotiations over issues which were not specifically addressed in the law and held that some post-$18,500 issues were simple, contractual interpretations disputes. For example, the district's contractual obligation to maintain the differentials on columns of the guide[8] and the district's obligation to adjust coaching salaries indexed to the first step on the guide[9] were deemed to be contractual disputes which should be resolved through the district's negotiated grievance procedures. Other grievances, including disputes over part-time salaries and stipends for special education teachers, occurred in New Jersey's districts and were submitted to arbitration without arbitrability challenges to PERC. Therefore, the actual number of post-$18,500 grievances is unknown; however, it is clear that in some districts administration of the locally negotiated 1985-86 contract was complicated by the TQEA; the board-union relationship in those districts was unquestionably aggravated by the state's imposition of an increased minimum salary.

Summary of 1985-86/1986-87 Effect

The TQEA was successful in achieving its stated purpose of increasing the state's teachers' minimum salary. However, the legislated introduction of a new minimum salary on school districts affected some districts' negotiations and complicated some labor relationships. The TQEA had a state-wide impact on the state's average teachers' minimum salary, but the extent of the effect on individual districts differed tremendously, with a few districts experiencing little or no impact, while others experienced longer and more complicated negotiations and/or increased conflict during contract administration. The effect of the TQEA is expected to continue, with the possibility of new issues emerging, as the TQEA approaches its third year of implementation and a change in its funding mechanism. This will, once again, present new challenges and new problems for boards of education.

Future Considerations

The New Salary Base The noted increase in teachers' salaries may not have caused an immediate, concurrent increase in local costs as the impact of the TQEA was funded largely, if not exclusively, by the infusion of state aid. However, an increase in teachers' annual salaries, regardless of the source of funding, increases the districts' total salary base. For example: District A's 1985-86 negotiated base was anticipated to cost $4,000,000. Bringing every teacher to $18,500, but without reopening negotiations, raised the actual total cost of the district's 1985-86 salaries to $4,091,865, or an additional $91,865. Although state aid funded the increase in 1985-86, the district's 1985-86 base was inflated from its locally negotiated increase by 2.3%. Unless the district distinguishes the local base from the total base in its future negotiations, the negotiated increase will be based on that inflated amount. The same percentage increase will yield a larger number of dollars if it is calculated on the actual cost of salaries, which includes $18,500 funds. The inflated 1985-86 base will remain with boards of education for years to come and will be compounded by future negotiated increases.

Boards that have experienced a significant base inflation as a result of the TQEA may thus be particularly well-served by negotiating future local increases in terms of flat dollars, rather than percent increases, or by clearly separating local costs from state-funded costs. Boards should also keep in mind that the salary base inflation will need to continue to be funded, either through the continued application of state funds or through additional local monies. For example, if a board applied all of its 1985-86 TQEA state-aid to the 1985-86 salary guide, it should keep in mind that all or part of its 1986-87 aid entitlement will be necessary to maintain the new base; if future state aid is applied towards new increases in salaries, the inflated base will need to be supported from other sources within the local budget.

Continued Funding The TQEA provided for full state funding for three years. Up to and including the 1987-88 school year, districts can expect to receive the difference between their below $18,500 1984-85 salaries and $18,500 for eligible employees.[10] However, aid entitlement is expected to change in the 1988-89 school year.

The TQEA specified that in 1988-89 the minimum salary would be funded in accordance with the recommendations of the Feldman Commission, a study panel established to review the entire issue of state funding. At this point in time, the Feldman Commission's work is still in progress. The Commission's direction concerning TQEA funding is unknown but it, or the legislature, may well be influenced by the Governor's well-publicized opinion that New Jersey cannot afford perpetual full-funding for the TQEA. However, the TQEA established a contingency plan in the event the recommendations of the Commission are not adopted by the legislature.

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[7] *Rumson-Fair Haven,* 1986 *S.L.D.* (Sept. 16).

[8] *Branchburg Bd. of Ed.*, PERC No. 87-15, 12 *NJPER* 17273; *Perth Amboy Bd. of Ed.*, PERC No. 87-29, 12 *NJPER* 17287.

[9] *Hillsborough Bd. of Ed.*, PERC No. 84-54, 9 *NJPER* 14298.

[10] Funding is based upon staff employment; staff employed as of 1984-85, below $18,500, continue to receive the difference between their step placement on the 1984-85 guide and $18,500; new staff reimbursement is based on the difference between $18,500 and the salary they would have been at if the 1984-85 guide were still in place. District funding is also annually adjusted for mid-year staffing changes.

In the absence of other legislative action, the law established a formula to determine districts' continued eligibility for TQEA aid for 1988-89 and thereafter. In 1988-89, salaries below $18,500 on the 1984-85 guide are to be multiplied by 1.21%; any calculation yielding more than $18,500 will render that step on the guide ineligible for continued aid; salaries which remain below $18,500 will continue to be funded. Thereafter, 1984-85 salaries will continue to be compounded by 7% annually; as calculations yield a result of above $18,500, state funding will stop.

Districts who lose state-aid entitlement will be able to add the amount of lost funds to their current expenditure budget and the amount will be exempt from the restrictions of the budget cap. It seems that the amount will need to appear as part of the total budget presented to the voters but what happens to that amount in the event a defeated budget is reviewed by local government, or by the Commissioner of Education, is unclear. There are no provisions to insulate the amount of lost state aid from recommended budget cuts.

Lost state aid is also to be added to the state's formula for equalized aid. The increased state aid to be received as a result of this calculation is unspecified and is likely to vary greatly among districts.

Districts that have been affected by the infusion of $18,500 monies can easily apply the TQEA formula to their 1984-85 guides to predict their future eligibility for continued aid under the TQEA. However, there are no assurances that this formula will be governing state aid in 1988-89 as the Feldman Commission's recommendations may be quite different than the TQEA provisions. In addition, anticipating voter approval of the authorized increase or the amount of increased equalization aid will be difficult. However, local boards need to anticipate the loss of state aid and to carefully prepare their future budgets to minimize the possibilities of disruption to the educational and operational programs of their districts. Increased salary bases will need to be maintained; negotiated increases will need to be honored and successor salary increases will need to be negotiated. More than ever, boards of education will need to give serious considerations to the needs of their districts and the implications of their negotiated increases.

The "Ripple" Effect As a result of the TQEA, the state's average minimum salaries on various columns of the guide increased dramatically. The average BA minimum salary's increase from $14,926 in 1984-85 to $18,533 in 1985-86 represents a 24.2% increase. By contrast, the average maximum salary on the BA column, which in past years demonstrated consistently larger increases than the minimum salary, increased by only 7.2%. However, this pattern does not appear to continue in 1986-87.

Initial results of 1986-87 guides (based on 432 guides) indicate a very moderate increase of 2.9% at the BA minimum but an 8.5% increase at the BA maximum, and an 8.6% increase at the MA maximum salary. These increases for maximum salaries are the highest increases observed by NJSBA analysts.[11] In addition, step 7 on 1986-87 surveyed guides indicated a 10% increase on the BA column and a 9% increase on the MA column.

Initial 1986-87 results, therefore, suggest the presence of a "ripple" effect or a pressure for additional increases to the salaries of more experienced staff in response to the mandated increases for younger and inexperienced staff. Early 1986-87 results, based on reports from 45% of the state's districts, indicate that the MA + 30 average maximum salary in New Jersey for 1986-87 was $35,775, almost a $3,000 increase over the 1985-86 figure.[12] The TQEA, therefore, appears to have had the effect of increasing all teachers' salaries as the effect of the increased minimum rippled down the state's salary guides.

It is also expected that administrative salaries will also demonstrate the effect of $18,500. Traditionally, administrators' salaries have been higher than those of the highest salary on the teachers' guide. Negotiations with administrators' associations will most likely be marked by pressure to match, or to exceed, the gains of teachers' negotiations.

The ripple effect should make boards even more interested in participating in the distribution of monies on the guide. Associations' desires to allocate negotiated funds to reward senior teachers who did not have the benefit of high starting salaries is understandable, but boards must be careful that future distribution does not compromise their ability to attract and retain excellent staff members. Achieving a mutually acceptable distribution on the salary guide, which can accommodate both parties' needs, will be a difficult and delicate task in future negotiations.

Implications for Future Salary Guides One of the relatively unknown provisions of the TQEA is its repeal of several sections of *N.J.S.A.* 18A:29 *et seq.* The TQEA repealed the statutory mandate that salary guide structure reflect both years of experience and education beyond the Bachelor's degree and the requirement that increments be given annually in recognition of an additional year of experience. Parties to local negotiations are, therefore, technically free to devise new and creative

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[11] *New Jersey Teacher Contracts, op. cit.*

[12] *An Analysis of Teachers' Contracts in New Jersey,* op.cit., p.32.

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systems of compensation. Yet, although the statutory format of the traditional guide has been removed, the traditional model remains a well-ingrained accepted method of compensating teachers. Reaching agreement on a totally new salary scheme may, therefore, be extremely difficult. It may be more productive for boards to work within the traditional format but to consciously focus on a distribution pattern which can best meet their districts' short and long range personnel needs.

Summary

In its initial years of implementation, the TQEA has complicated local negotiations and some districts' ongoing labor relationships. Although developing case-law, and the passage of time, have resolved many early uncertainties, other related problems will need to be addressed in the near future. However, in one aspect, the TQEA has been a successful state policy: it has met its short term goal of increasing the starting salaries of New Jersey's teachers and may also be responsible for a general increase in teachers' salaries. Whether the TQEA will meet its long-range goal of attracting the "best and the brightest" to the teaching profession, remains to be seen.

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THE PITFALLS OF COMPARABILITY DATA

Raw teacher contract data, statistics, numbers, percentages, means, medians... These can be potentially powerful tools at the bargaining table. They can also present a potential liability if not used wisely. Many a school board negotiator has fallen into traps involving salaries, fringe benefits, settlement rates, and more. Awareness of these traps, or pitfalls, when using comparative data can make the difference between the board negotiator skillfully refuting the union's statistical claims or his being caught off guard and put on the defensive.

You may be one of those people who cringe at statistical data; possibly the mere sight of a median is enough to send you on a chocolate binge for days. But comparability data is an essential fact of life in all aspects of collective negotiations—from the planning phase, to the actual at-the-table bargaining phase, to the mediation and factfinding phase. For better or worse, comparability data often has more impact on public education contract settlements than any other single factor, including CPI or local budget cap. Hence, it is critical to not only know how to turn raw data into meaningful information most advantageous to the board's position, it is also vital to be aware of common errors inherent in the comparability research process.

Before examining these potential pitfalls, a brief review of the most common criteria used in selecting comparable districts is in order.

Criteria for Comparability

Statewide averages and percentages are reported in publications produced by the New Jersey School Boards Association and the New Jersey Education Association. Comparing a district's salary, benefits, and language items with statewide figures may provide an overall view of where that district's employees stand in relation to every other district in the state. However, there are a wide range of factors that make up different districts' profiles across the state. These factors can and do have an impact on what a district will agree to in negotiations. Therefore, it is important to select districts for comparative purposes that have similar profiles. This selection process is most often done on the basis of geography, demographics, and budget cap.

Geographic Basis

School boards usually begin by comparing their teachers' compensation package to that of other teachers in the same county. The assumption is that teachers in neighboring areas work in similar districts under similar circumstances. Some school boards broaden this geographic comparison to include neighboring counties, while others may choose to narrow their selection of comparable districts to adjacent districts in the immediate vicinity.

Demographic Basis

Some districts choose to compare themselves to other districts with similar demographic profiles. The State Department of Education has developed a number of demographic variable classifications that help in identifying comparable districts. These classifications include: wealth, socioeconomic status, enrollment group, and community type.[1]

Budget Caps

One other important factor that serves as a guideline in identifying comparable districts is the budget cap. Established annually by the state, budget caps are limits on how much a district's net current expense budget can increase. As the cap clearly affects a district's ability to spend new monies on improved salaries and benefits, school boards often elect to compare their teachers' compensation package to those in districts with similar budget caps.

Having reviewed the major comparability criteria, let's now turn to the pitfalls.

The Pitfalls

Two broad areas of pitfalls have been identified for the purpose of this discussion: those that relate to the *process of selecting* truly comparable districts and those that concern the *methodology utilized* when actually comparing contracts of comparable districts.

Selecting Truly Comparable Districts

The County Comparison Trap. As previously mentioned, geographical location is one basis for identifying 'similar' districts. The problem is that this may be the *only* criteria that some school boards and unions use when selecting comparable districts. Thus, we have what may be called the "county comparison trap" because differences that exist among districts in the same county are largely ignored. A district may, for example, be a small, elementary, low-wealth district. If this were the case, it would be unlikely that it could afford settlement terms akin to those agreed to in larger more affluent districts in the county. This is not to say that county-wide comparisons are invalid; it merely suggests that further comparability research may be indicated. More thorough and indepth analysis could be accomplished by using the abovementioned demographic variables.

The Short-Stop Trap. Even if the board's negotiating

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[1] For a more detailed description of these demographic variables, see *An Analysis of Teachers' Contracts in New Jersey 1985-86/1986-87*, New Jersey School Boards Association, 1986, pp.10-11.

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team is diligent in locating districts in the county or area that have similar demographic profiles, it may still find unexplained discrepancies. Many negotiators stop short, not realizing that exploration into less obvious areas could provide information that would bolster their bargaining positions. For example, a district whose salaries rank low compared to other districts' in the county may find, upon further investigation, that it provides more paid leaves of absence, has a shorter work year, or requires fewer work hours or teaching periods. Perhaps the reason for the difference lies in the grade pattern or enrollment grouping. Another explanation for the disparity could be that some of the higher paying districts may have difficulty attracting teachers for one reason or another. Possibly their schools have discipline problems, larger class size, or other such factors that require additional compensation in order to induce teachers to accept employment.

What this all adds up to is a lot more work for the negotiator or bargaining team member assigned to do this research. However, the contract comparisons themselves will be more valid and, perhaps, more supportive of the board's position if these extra steps are taken. Moreover, if a district is compiling this information for an upcoming factfinding hearing, the factfinder will expect the district to describe the criteria it used to select comparable districts.

Research Methodology Pitfalls

Research methodology contains many areas of potential inaccuracies or errors. Although such errors are not always avoidable, awareness of these problem areas is vital to good research.

Settlement Rate Traps. Several comparison difficulties fall into this category. The first concerns the definition of settlement rate. Some districts define settlement rate as the average percent increase in salary over the previous year's, including increment and the cost of new fringe benefits. At the other end of the spectrum are those districts that interpret settlement rate to mean the average percent increase in salaries, not including increment or fringe benefits. The most common definition of settlement rate is the average percent increase in salaries, including increment but not including the cost of benefits. Regardless of which definition is used, the important point is to be consistent so that "apples are compared to apples" rather than to oranges or avocados.

The second difficulty, which is closely related to the first, results from the passage of the Teacher Quality Employment Act (TQEA), often referred to as the $18,500 minimum salary law. The TQEA required school boards to pay all full-time teaching staff members a minimum salary of $18,500, and provided school districts with three years of funding to implement the Act. The method established for calculating the levels of funding resulted in excess or residual monies being received by school boards.[2] To comply with the mandate of this law school boards increased their locally negotiated settlements using TQEA funds. In addition, union pressure in many districts resulted in negotiations over distribution of the residual funds to teachers who were earning more than $18,500. As a result of these additional monies being applied to teachers' salaries, two types of settlement rates may be identified for the 1985-86, 1986-87 and 1987-88 school years: the *locally* negotiated settlement rate and the *total* settlement rate including TQEA funds.[3]

Districts across the state received different levels of funding and have taken a wide variety of approaches in distributing the excess funds. These factors greatly influence the settlement rates being reported. Thus, it is important when comparing settlement rates to know what the figures include. Moreover, settlement rates are not only affected by *how* the residual funds were distributed (e.g., on-guide, off-guide, etc.) but *when* they were distributed (1985-86 school year, 1986-87 school year, etc.).[4] Suppose, for example, four districts with similar demographic profiles have been selected for inclusion in a comparability study of 1986-87 settlement rates. If one district received no TQEA funds (because none of its teachers were being paid below $18,500 in the base year), and one district distributed its residual funds in 1985-86, and the other two districts distributed their residual funds in 1986-87, then these four settlement rates will not offer meaningful comparisons. Such comparisons can lead to invalid conclusions.

As it becomes increasingly troublesome to compare settlement rate percentages among various school districts, average dollar increases may offer practitioners a more relevant source of information. For example, while three similar districts may have negotiated an 8% increase, a better perspective of these settlements may be gained by assessing the average dollar value. In one district, 8% may represent a $1,791 average increase; in another district it may be $2,054; and in the third district 8% may amount to an average increase of $2,500 per teacher. Knowing

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[2] Under the terms of the Teacher Quality Employment Act, funding was calculated using the 1984-85 salary levels as the base, but was applied to the 1985-86 salaries; thus, the amount of funds received by boards exceeded the amount needed to bring teachers' salaries up to $18,500. While school boards were not required by the TQEA to reopen previously negotiated agreements to discuss distribution of the residual funds with their teacher unions, many unions sought negotiations over these monies.

[3] For a more complete discussion of the "local increase" and the "total increase" and the various ways that school boards have distributed the residual TQEA funds, see *An Analysis of Teachers' Contracts in New Jersey 1985-86/1986-87*, NJSBA, 1986, pp.27-28.

[4] For a more indepth explanation and examples of the TQEA's impact on comparability research, see the Labor Lookout column of the January/February 1987 issue of *School Leader*, entitled "Comparing Settlement Rates: Caveats for 1986-87."

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the average dollar increase as well as the average percent increase can bring the salary settlement picture into clearer focus.

Fringe Benefit Traps. When comparing compensation packages among similar districts, it must be remembered that benefits—for example, dental insurance—are not absolute. In other words, for any given benefit, whether it be dental, prescription drug, or optical, there is a wide range in types of plans, quality of coverage, cost to the district, and benefit to the employee. Districts should be careful to avoid the "dental insurance is dental insurance is dental insurance" trap.

For example, if a district is faced with a proposal for a comprehensive dental insurance plan, including family coverage, and the union is supporting its position with the argument that 94% of the districts in the county provide dental insurance, keep in mind that the 'deluxe' plan that the union is proposing may bear little resemblance to the coverage being offered in the other districts it is citing. A survey of districts in the county may show that some of the insurance plans require a co-pay by the employees; others may be inexpensive plans for employees only, or may contain other exclusions affecting the actual cost and value of the insurance.

Another factor important in fringe benefit comparability research is the presence of a "cap." A cap is a limit on what the school board will spend for any given benefit or insurance plan. If the costs of an insurance plan exceeds the cap, then the additional costs are usually absorbed by the employees. As the existence of an insurance cap establishes a maximum liability for the district, it is an essential factor which must be considered in fringe benefit comparisons.

Thus, an initial survey of the prevalence of an insurance plan and the coverage under that plan may not tell the whole story. More information about costs, benefits, exclusions, and caps may need to be obtained from individual districts. This more indepth comparability research may provide the data needed to counter the union's demand that the teachers' compensation package be "brought up" to the "prevailing level" in the county.

Salary Comparison Traps. This is one of the most difficult areas that negotiators and comparability researchers face when compiling data from various districts. The format and structure of salary guides, for instance, are so varied that comparisons may be extremely difficult and the chance of error quite great. Again, however, awareness of the problems inherent in salary guide comparisons will facilitate avoidance of the pitfalls. When describing salary guide traps, examples will be used, where possible, for illustrative purposes.

Average Salaries The first complication arises when comparing average salaries among different districts. The reason is obvious: the average teacher salary in any given district is not only the function of the amount of money that exists on the guide, but also the experience and educational attainment of teachers on that guide. For example, let us assume that the average teacher's salary in your district is $24,800 and the average teacher salary in another district is $27,450. Your initial conclusion may be that teachers are better paid in the other district. However, if the average length of service in that district is 15 years and the average length of service in your district is 8 years, then your teachers' salary guide probably offers a higher level of compensation than does their salary guide.

Minimums and Maximums The second set of problems arise when comparing salary guide minimums and maximums. In the past, minimums offered a poor point for comparison because in many districts the money had traditionally been distributed by the union and had been placed at the middle or top of the guide where most of the teachers were. The recent minimum salary legislation has had an equalizing effect on salary guide minimums, and thus comparisons of minimums continue to be, in most instances, largely unrevealing.

The problem with maximums on the guide is that they may not truly reflect the maximum that teachers are paid. Teachers in some districts may be paid "off the guide" once they have reached the maximum step. Such off-guide salaries often go unreported and may distort comparisons. Maximum salaries may need to be verified with the districts being used in the comparative research. Another aspect of maximum salaries, of which districts will want to be careful, is longevity and supermax. That brings us to the next potential "salary guide pitfall."

Longevity and Supermax When comparing teacher compensation across different districts, it is important to remember to include longevity and supermaximums in the analysis. Supermax refers to salaries paid above the maximum on the guide. Sometimes it is listed as part of the guide, other times it is contained in separate language. Longevity usually refers to additional salary payments made to employees after so many years of service in the district or after reaching a certain step on the salary guide. A longevity payment provision is usually indicated at the bottom of the salary guide although it may sometimes be found in another section of the contract. Ignoring longevity payments or supermaximums may result in deceptive comparative data.

For instance, let us say that your maximum step on the BA column is step 20 and teachers on that step are compensated at $32,500 per annum. For the sake of simplicity, suppose that a district chosen for comparison also has a BA maximum at step 20 and the salary paid at that step is $34,000. At first glance you may assume that teachers with 21 years experience in your district receive less salary than teachers with 21 years experience in the other district. But further investigation and calculation may reveal that your contract provides longevity payments and supermax payments above step 20 while the other district's contract does not. If your contract specifies that teachers who were on step 20 last year shall receive a supermaximum amount of $1,800 this year above the indicated maximum on the guide, and if your contract further specifies that teachers who have 15 years of service in the district will receive $1,000 in longevity, then the story changes. The teacher with 21 years of experience in your district will be paid $35,300 this year compared to the teacher making $34,000 in the other district.

[redacted]

Thus, for any given salary guide comparison, districts will want to ensure that all forms of salary payment are included.

Number of Steps Another important area of consideration that is often overlooked when comparing salary guides is the rate at which teachers move toward maximum. Assumptions made about salary guides that have very similar minimums and maximums may be quite erroneous if the number of increments or steps on the guide are ignored. To illustrate this pitfall, let's take the example of District A and District B. District A has a BA minimum of $18,500 and a BA maximum of $29,000. District B has a BA minimum of $19,000 and a BA maximum of $30,000. Neither district provides longevity or supermax. Preliminary review of this information may indicate that the two districts compensate their teachers almost identically. However, an important factor has been overlooked: the number of years it takes for a teacher to attain that maximum payment. If District A's guide has 10 steps and District B's guide has 18 steps, then a teacher on step 8 of District A's guide will be close to maximum and will probably be earning around $26,900. A teacher in District B, however, will still be a long way off from achieving maximum payment on the BA column and will probably be earning around $23,800. With this additional information, [illegible] different conclusions may be drawn about the similarity of teacher salaries in District A and District B. To help avoid this pitfall and the problems inherent in comparing minimums and maximums, it may be advisable to also compare some mid-guide steps (such as steps 5, 7, or 10). When doing so, however, be wary of the guide compression trap.

Guide Compression Over the past few years, many districts throughout the state have begun to compress, and are continuing to compress, their salary guides. Compression refers to the shortening of the guide by eliminating or combining certain steps on the guide. The problem created for the comparability researcher is that of how to compare salary guides when years of experience is no longer apparent. A teacher on step 5 in one district that compressed its guide may not be comparable to a teacher on step 5 in a district where no guide compression has taken place. In the former district, the teacher may have been on step 10 prior to the compression, whereas the teacher in the latter district may have been in the district four years and just achieved placement at step 5. This problem has become more prevalent as negotiations have resulted in districts restructuring their guides to comply with the $18,500 minimum salary law.

To steer clear of this potential pitfall, districts will probably want to begin by reviewing contracts for any language indicating that there has been guide compression. It may be evident from the guide itself or accompanying charts. Some districts which have compressed their teacher salary guides now have a column indicating the step number as well as a column indicating the years of experience at each step. If this is not the case, individual districts may need to be contacted directly to ascertain if compression has indeed taken place.[5]

As has been illustrated here, salary guide comparisons have become a difficult chore, and, given recent changes in the law, such comparisons have become even more challenging.

Conclusions

Varying degrees of weight and importance are given to comparability research by different school board negotiators and at different stages of bargaining. When formulating bargaining goals, for instance, school boards are usually quite cognizant of other school districts' settlements. During actual negotiations, reliance on comparative data ranges anywhere from those districts who use comparability arguments simply as a rhetorical device to those who tie their settlement rate directly to the average settlement rates of comparable districts. Comparability research becomes *most* significant for those districts that reach the mediation and, in particular, factfinding stages.

Factfinders rely very heavily on the use of comparability figures when fashioning their final recommendations for settlement. In preparing for factfinding, school districts would be well-advised to analyze exhaustively all relevant data and to present it in such a way as to support their arguments and to diminish the other side's claims.

Whether it be in face-to-face negotiations, mediation, or factfinding, an awareness of the pitfalls can be useful. It will better enable school board negotiators to highlight data most pertinent and supportive of their claims, to downplay the areas that will reflect badly on their positions, and to point to deficiencies in the data presented by

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[5] To facilitate salary guide comparisons, NJSBA's *An Analysis of Teachers' Contracts in New Jersey* now surveys districts for years of credited experience at BA minimum, step 7, and maximum salaries and reports this data in the district-by-district listings of salary and benefit information.

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the union negotiator. Bear in mind that, in some cases, what can be viewed as a "trap," may, at other times, be viewed as a "loophole." As one well-known, experienced negotiator once said: "We must use the figures—not let the figures use us."

One final caveat is in order before closing: Be aware of the limitations of all figures. The first limitation of figures concerns the *technical nature* of numbers, meaning that they are highly susceptible to error. Numbers and percentages are calculated by school districts, forwarded to professional analysts, input into computers, interpreted, typeset, and published. Occasionally in this chain of events, an error in the information may occur and may be processed with the rest of the accurate data. Thus, some of the data obtained from one's own research, and from professional publications, may need to be questioned, verified, or taken with a grain of salt.

The second limitation of figures concerns their *symbolic nature*. Statistics can never tell the whole story. They are a generalization, an overall picture, of what is happening in other districts. For example, a settlement rate may represent the culmination of the interchange between two parties. That is all it represents. The factors behind the negotiations, the pressure and goals influencing the parties and their settlement are unique; numbers can tell nothing of that story. Hence, it is important to keep in perspective the role of comparability during negotiations.

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UNDERSTANDING THE UNION AND ITS ROLE AT THE BARGAINING TABLE

A thorough understanding of the bargaining process and of the bargaining issues is a prerequisite of successful negotiations. Yet, in the flurry of negotiations preparation—in the midst of assembling relevant comparative data, developing board proposals and parameters, and analyzing the impact of union proposals—few board negotiations teams stop to assess the organization they will be facing across the bargaining table. Understanding the union, its role and its needs, however, is necessary for the board to obtain a sound perspective of the flow of bargaining, to set realistic bargaining expectations, to plan effective bargaining strategies, and to develop a productive on-going labor relationship.

The Board and the Union

Virtually all boards in New Jersey have an established relationship with at least one employee union. Most interactions between the board and the district's unions generally occur in an environment marked by competition rather than cooperation: the board level grievance procedure challenges the decisions of the board's administration; arbitration involves an appeal of the board's determination; and negotiations attempt to limit the administration's flexibility and to influence the board's allocation of district resources to benefit employees. The competitive nature of the board-union relationship is a logical result of the differing responsibilities and perspectives of the two bodies. The union is the advocate of employee interests; but the board is the advocate of the entire district and as such, it must balance employee interests with the needs of students, the needs of the local educational program, as well as the needs of the taxpayer, in order to meet its responsibility to protect the district's interest.

In the midst of the competitive and adversarial aspects of the relationship, the interdependence of the board and the union tends to be overlooked. A board cannot legally change terms and conditions of employment without obtaining agreement from the union nor can the union achieve its goals without the board's consent. The ability to cooperate and to reach consensus is essential to reaching a negotiated agreement and to the on-going board-union relationship. However, the conflicting perspectives of the board and the union frequently create hostile, combative attitudes which intensify the adversarial relationship and interfere with the parties' ability to cooperate.

A clear understanding of the union's role, its goals and its needs, can assist boards of education to develop productive attitudes and strategies which can reduce belligerency and improve the parties' ability to cooperate within the context of their different perspectives. To that end, boards need to develop sensitivity and appropriate responses to the union's role as a bargaining agent, to the relationship of the union to the teachers, and to the union's organizational needs.

The Union as a Bargaining Representative

The union is the exclusive bargaining representative of the bargaining unit. As such, the union's purpose at the bargaining table is to represent the interests of unit members in improving the terms and conditions of their employment through the process of collective negotiations.

All unions, regardless of the nature of their membership, seek to obtain these gains at the bargaining table. Whether the bargaining unit consists of private sector blue collar employees or public sector professional employees, the union's role as the unit's exclusive bargaining representative is to advance and protect the unit's contractual benefits. Therefore, the teachers' union's first priority at the bargaining table will simply be to represent the needs of its membership; the needs of the district and the resources of the community will become union considerations only in later stages of bargaining when the union must assess the realities of reaching a settlement. However, during most of the bargaining process, the teachers' union will staunchly and aggressively seek to obtain additional benefits for its teachers and resist any efforts to reduce existing terms of employment; the teachers' union will act as a *bargaining* representative for teachers.

The teachers' union's status as the exclusive bargaining representative and its role at the table are statutorily established in *N.J.S.A.* 34:13A-1 *et seq.* The union's bargaining role is thus legitimate and valid in the context of collective negotiations.

Frequently, however, board members are offended, angered, and frustrated by the teachers' bargaining team positions. Expecting teachers' concerns about the kids and the quality of the educational program to be expressed at the bargaining table, board members may tend to react negatively to what they perceive to be selfish, narrow-minded negotiations positions which place the welfare of the teachers above the needs of the district. Understanding the union's role as the teachers' bargaining representative, however, can be a reminder to the board that the union is at the table precisely to represent and to protect the teachers' welfare and that it is the board team's responsibility, and not the union's, to represent and to protect the needs of the district.

The union team's bargaining stance should therefore not be interpreted as indicative of teachers' selfishness and lack of dedication to the process of instruction; indeed, the most aggressive union team member may be

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the very teacher who remains in school working with individual students until late in the afternoon, far beyond the contractual teacher day. The bargaining table, however, is not the forum in which teacher dedication can, or should, be expressed. Determination and implementation of educational policies are not, and should not, be raised in negotiations. The bargaining table is the forum in which, through give and take, both parties' competing interests in the allocation of resources can be resolved to a mutually acceptable understanding of governing terms and conditions of employment. Board members can be more effective and productive at the table if they respect the teachers' right to exercise their bargaining rights and expect, and accept, the union to act as a bargaining agent.

The Union and the Teachers

Given the union's function as a bargaining agent and its focus on teachers' interest in their terms and condition of employment, it is not surprising that board members sometimes tend to perceive "the union" and "the teachers" as two separate and sometimes contradictory entities. Board members sometimes characterize bargaining proposals as "the union talking—our teachers would never support that position." Although this assessment may be very accurate during the early stages of negotiations, it is generally an illusory assumption in the later stages of the process. Indeed, in the last few years, it has appeared that some teachers have been more demanding than the union: tentative agreements have been rejected by the union membership and the teachers have sent their union representatives back to the table for a better deal. Generally, however, teachers can be expected to support their union's bargaining positions.

Sometimes, the teachers may not be aware of negotiation positions. The union leadership may keep the membership uninformed about the progress of negotiations and, on rare occasions, may deliberately misrepresent boards' positions. In those instances, board members are frequently motivated to tell the teachers the truth. However, direct board communications of negotiations positions to the staff may backfire. If the board does not have an on-going board-staff communications network, the board's information may be suspect as a self-serving attempt to by-pass and discredit the union; teachers' reaction to the perceived attack on their representatives may be to rally behind the leadership and to fully support the union's posture.

Although not every unit member may fully endorse every position taken by the union or be in complete agreement with the union's established priorities and parameters, all unit members know that the union, and not the board, represents them at the table. Teachers will trust the union and its recommendations because of their belief that the union is at the table to guard their best interests. Indeed, the union is present at the table because the teachers have chosen to be represented in bargaining by the current organization. Thus, a majority of the bargaining unit has expressed its belief that its interests can best be served by the union. Repudiation of the union, or a lack of trust, is far more likely to result from the teachers' perception that the union is too friendly with the board and is not sufficiently aggressive in protecting teachers' interests than from a sense that the union is disliked by the board because it is too demanding. Further, teachers are aware that a show of unity during negotiations is an effective demonstration of bargaining power which may be necessary to achieve their bargaining goals. Thus, a lack of trust in the union and its leadership will generally be demonstrated during union elections and not by repudiation of the representatives' vigorous efforts during negotiations.

Recognizing the relationship between the union and the teachers can prevent the board from proceeding on false assumptions which will only strengthen the union's bargaining posture. Boards should expect that, in most circumstances, teachers will not only expect their union to protect them but will, in turn, support and defend their bargaining organization.

The Union as an Organization

A local teachers' Association, no matter how small, is not an informal, unstructured group; rather, the local is a formal organization. It is usually affiliated with a parent, state-wide association as well as with a nationwide organization. The overwhelming majority of New Jersey's teachers' locals (97%) are affiliated with the New Jersey Education Association (NJEA) and the National Education Association (NEA); approximately 2% are affiliates of the New Jersey State Federation of Teachers and its parent organization, the American Federation of Teachers, and the AFL-CIO.

The state and national organizations provide locals with a wealth of information concerning legislation, negotiations positions, and collective bargaining data; in addition, approximately 50% of New Jersey's teachers' locals utilize the services of a professional negotiator provided by the state association. However, the teachers' bargaining agent is the local association and not the state organization.

The local itself, regardless of its affiliation or its degree of cohesiveness with the parent organization, is a formal organization. It has goals; it collects dues for itself as well as for the county, state, and national branches; it is governed by a constitution and by-laws; it holds periodic elections, and the leadership is accountable to the membership. As such, the local Association is subject to the same pressures, problems, and needs of any other organization. These internal organizational problems will affect the union's behavior at the table; therefore, an awareness of union problems can assist boards of education to develop appropriate strategies to respond effectively to the union's bargaining position.

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Goal Attainment

The union's primary goal is the protection of its members. Attaining procedural safeguards against administrative action, providing procedures to appeal administrative actions, limiting teachers' workload, and increasing compensation as well as benefits, are the most common expressions of membership protection at the bargaining table. Special and specific organizational goals can also emerge when court decisions or changes in legislation result in a state-wide perceived need or when local conditions indicate a need to address a particular issue troubling the local membership.

The local leadership, as well as its affiliation, is judged by its ability to meet its goals and its ability to deliver protection to its membership. Leadership which is perceived to be unsuccessful in meeting local needs, or which is perceived to be lagging behind other associations in the delivery of benefits, may lose the confidence of its membership and be replaced, in the next election, by other individuals perceived to be more responsive to the membership and more aggressive in its search for employee protection. Occasionally, membership dissatisfaction may well lead to a complete rejection of the current organization and a change in the bargaining representative's affiliation.

Therefore, obtaining and maintaining protection of the membership remains a driving, motivating force for the union's bargaining team. If the majority of the associations in the county have obtained contractual dental plans, achieving dental insurance will become a high priority for those locals who have not yet persuaded their boards to agree to this form of insurance protection; unions who have successfully gained full insurance coverage will perceive a board's proposal to cap its premium obligation as an attempt to erode existing employee benefits; and a union which has always been in the forefront of obtaining employee benefits will jealously guard its position as the pacesetter. Thus, the union's need to attain its goals will affect the union's team behavior at the bargaining table.

Understanding the local union's need to meet its organizational goals can assist the board in placing union proposals in perspective. Rather than reacting with indignation and hostility to the union's constant search for increased benefits, the board can respond realistically and productively. Objectively, the board can assess the importance of specific proposals, review comparability data, evaluate the impact of agreement on the district, and begin to formulate compromise positions which can, to an acceptable degree, meet both the union's and the board's needs.

Maintaining Unity

Union goals are an expression of the needs of the membership. However, bargaining units are composed of individuals whose needs frequently differ; even a unit composed of only one job classification does not represent homogeneous needs. For example, a teacher unit can include librarians and nurses whose working conditions differ significantly from those of the classroom teachers; the experience and needs of elementary teachers can be considerably different than those of high school instructors; and teachers' areas of certification and assignment can create unique problems which are not shared by the rest of the unit.

In addition to different needs resulting from varied work experiences, teachers have different personal needs which they will want addressed in bargaining. Senior teachers will want increased longevity pay and retirement benefits; younger staff may want additional tuition reimbursement to foster professional development and a compressed salary guide to accelerate their movement towards better salaries; teachers who are their family's primary wage earners will find dependent insurance coverage a necessity while a single teacher, or a secondary wage earner, may be far more interested in increased paid time off.

The varied work and personal experience of the unit members create different needs and priorities. Frequently, all members' needs cannot be accommodated; choices must be made and the membership can find itself competing against each other to influence the determination of the unit's bargaining goals.

It will be the responsibility of the union leadership and its bargaining team to resolve the unit's internal differences and to create unity amidst the diversity. To that end, the union leadership may base its bargaining priorities simply upon the number of unit members who are strongly committed to the proposed change. The tentative settlement presented to the unit for ratification must contain sufficient improvements to receive acceptance and endorsement by a majority of the membership; the greater the improvements and the greater the number of diverse needs addressed in the settlement, the better the chances of unanimous acceptance and membership unity.

The union's bargaining team begins the process of achieving unity before it enters into negotiations. It is not unusual for a union team to poll the membership to determine what changes in terms and conditions of employment are desired, and to proceed to include all responses in its initial set of proposals. The union's "laundry list" of proposals thus not only provides a rich source of trade-offs during bargaining, but also can be a mechanism to achieve internal union needs. The board team can assess the importance of various proposals by determining the number of unit members who will be affected by the proposal and their degree of influence within the unit. An understanding of the diversity of union needs can also assist the board to realistically assess the components of a settlement which may be necessary for union acceptance.

The process of achieving union unity continues during the course of negotiations. Frequently, the union team reports on the progress of bargaining to the union's executive committee and/or to the membership. Areas of board resistance are discussed and the membership is usually prepared for union defeats and compromises. A skillful union team, just like its board counterpart, is aware that negotiations is a progressive process which is marked by slow, incremental movement, shaped by compromise, timing, and reality. By communicating the currently achievable and the currently impossible, the union is demonstrating its efforts for the membership as well as working towards attaining realistic membership expectations, ratification, and unity. If a union bargaining team is unsuccessful in persuading the membership that the tentative agreement represents the best currently achievable deal, the settlement will either not be ratified or its approval, by a narrow majority, will threaten the unity of the bargaining unit. The union team will thus be looking for compelling explanations to present to its membership.

In preparing to present and support their bargaining positions, board negotiators should therefore develop arguments which will be persuasive to the union team. Well-planned, substantiated board positions which include considerations of the negative over-all impact on the unit, as well as on the district, can be more convincing to the union team than generalized emotional and vague responses. Not only can the union negotiators understand the board's opposition and its rationale, but they can utilize the same well-reasoned arguments to explain to their membership why the union's proposal is unacceptable and realistically unattainable at this time. Thus, the union leadership's receptivity to a well-documented board position is enhanced by its assessment of its ability to "sell" it to the membership.

The Needs of the Leadership

The leadership of any organization is marked by the responsibility of promoting the health, well-being, and continuity of the group. The dedication of the union leadership to union goals is, therefore, to be expected as a natural expression of its role. Regardless of its private assessment of the validity of a grievance, the union leadership will vigorously pursue the negotiated appeal procedures not only to defend the negotiated rights of its membership but also to protect the union's role, and image, as the protector of the employees.

The organizational functions of leadership are, in all democratic associations, frequently emphasized by individual aspirations and motivation. Representatives who enjoy their elected role and find the responsibilities challenging may want to continue to perform these tasks or may aspire to higher organizational positions. Reelection, whether to a board of education or to a position in the union, depends upon being responsive to, and representative of, one's constituency. Thus, union leaders will be sensitive to the needs and mood of the membership; leadership styles and decisions may, therefore, be a reflection of the leadership's assessment of the desires of the membership rather than expressions of the leaders' personal goals. This does not mean that leaders never use their positions in an organization to fulfill their own economic or political needs, but leaders who pursue their own goals while ignoring the interests of the membership, will find it difficult to continue to be re-elected. Thus, all leaders will attempt to meet their constituencies' expectations; and union leaders will attempt to deliver as much as is possible to their membership.

The intensity with which union leadership will seek to deliver additional benefits is affected by many factors, including the leadership's sense of its own security. A bargaining team representing a unit which is torn by dissension, which includes a small majority of union members, or which may be facing the emergence of a challenge by either a rival union or a rival slate of officers, may feel intense pressure to demonstrate its importance in providing membership protection. Threatened leadership may, for internal organizational reasons, become intransigently wedded to a position and be unwilling to recognize the realistic, and possible, range of settlement; threatened leadership can become completely motivated by its own internal needs. On the other hand, secure leadership is less likely to lose sight of the interdependence of union and district needs necessary for a settlement.

Although boards of education should never become involved in the union's internal affairs, it is undeniable that the relationship which exists between the board and the union can become a factor in the leadership's security. The membership may find leadership that is bypassed or ignored by the board to be lacking in effectiveness and credibility; however, leadership whose role and status are recognized by the board is much more likely to receive membership respect and support. By responding to the union with acceptance of its bargaining role, and with an understanding of the eventual need for mutual cooperation, boards can contribute to the union's ability to recognize and to move towards the basic mutual need to reach consensus.

Summary: The Board's Response

Understanding the role and the problems of the union can assist the board to improve its bargaining effectiveness and its on-going labor relationship. Expecting and accepting the union's position as a bargaining agent can prepare the board for the realities of negotiations and can reduce board members' hostile reactions to union proposals. Reduced hostility can not only focus discussions on the issues, rather than on personalities, but also can facilitate the possibility of consensus. Understanding the organizational needs of the union and its leadership increases the board's ability to view the bargaining process and its resulting settlement in a realistic context. A sense of the achievable can help boards to identify long-term and short-term bargaining goals as well as to develop effective tactics and strategies to support their achievement.

Appropriate board responses to the realities of the union, however, must include a sharp and clear consideration of the board's needs. *In spite of their appreciation of union needs, boards should not agree to terms and con-*

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ditions which will interfere with the effective administration of the district's educational or operational program. A refusal to agree, however, should be based on the board's logical assessment of its parameters and of careful consideration of the long and short range implications of agreement. A refusal to agree should not be based upon the board's dislike of the union negotiator, its lingering resentment of the bargaining process, or its desire to "win big" and to bring the union to its knees. Appropriate board responses are based upon careful, conscious considerations of the needs of the union and the board.

Well-reasoned board responses will not change the competitive, adversarial relationship between the board and the union, but they will reduce the hostility which can interfere with the parties' ability to reach agreement. Well-reasoned board responses which are based on a balance between board and union needs can, therefore, lead to effective board bargaining and to a productive ongoing labor relationship.

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DETERMINATION OF THE APPROPRIATE SUPERVISORY BARGAINING UNIT

In recent years, many boards of education have been faced with the dilemma of expanding supervisory bargaining units. Units traditionally composed of principals, vice principals and/or assistant principals now encompass, in many cases, a broader range of supervisory titles such as department chairpersons, supervisors of instruction, coordinators, and/or directors. This trend has occurred over the past decade as supervisory roles and responsibilities have drastically changed.

Initially, such changes in job responsibilities led to the removal of numerous supervisory positions from existing units of teachers. As the Public Employment Relations Commision continued to sever supervisory employees from nonsupervisory bargaining units, the displaced employees found themselves without representation.

In some districts, supervisors organized and formed new bargaining units; in other districts, they sought inclusion in existing administrative units in accordance with PERC's established preference for broad base units.

These solutions, although seeming natural alternatives to the problem of supervisory representation, were not equally well received. On the one hand, petitioning school boards were satisfied with the removal of supervisors from units composed of teachers because it resulted in the elimination of actual or potential conflicts of interest between supervisory and nonsupervisory employees; on the other hand, boards were distressed by the expansion of existing administrative units and, in some cases, challenged the appropriateness of such bargaining units.

On the surface, the matter seems clear. By applying the same reasoning to expanded supervisory bargaining units as applies to cases involving joint supervisory/nonsupervisory units, one may logically assume they are similarly inappropriate. Such an automatic assumption, however, is premature. The former case is significantly more complex and raises additional legal issues which distinguish between the two situations. Accordingly, under most circumstances, PERC has held such expanded supervisory units to be appropriate for purposes of collective bargaining.

A brief examination of the historical background will help to illuminate the distinction between the two types of cases. Upon the State Board of Education's adoption of rules and regulations mandating the annual evaluation of tenure teaching staff members on July 6, 1978, the traditional role of supervisory personnel significantly changed. No longer were individuals holding such positions merely concerned with curriculum development and routine administrative functions such as budgeting and/or scheduling. The new era marked a chain reaction among local boards of education to either amend existing job descriptions or create new middle management positions with additional "supervisory" duties. In addition to evaluation responsibilities, typical new duties also included, but were not specifically limited to, participation in the hiring, disciplining or discharging of the district's certificated employees. The expansion of supervisory duties effectively met the challenge of the State Board's new evaluation requirement, but simultaneously created unexpected labor problems. Heretofore, many of the currently existing positions which were affected by administrative reorganization, were included in teachers' bargaining units; however, the Employer-Employee Relations Act, *N.J.S.A.* 34:13A-5.3, in relevant part, provides: "nor, except where established practice, prior agreement or special circumstances dictate to the contrary, shall any supervisor having the power to hire, discharge, discipline, or to effectively recommend the same, have the right to be represented in collective negotiations by an employee organization that admits nonsupervisory personnel to its membership...." In case after case, PERC's decisions were consistently clear: supervisory personnel, as defined by the Employer-Employee Relations Act, were to be severed from nonsupervisory units.[1]

Although the Public Employment Relations Act distinctly prohibits bargaining units which include both supervisors and nonsupervisors, no such similar prohibition exists within the category of "supervisory employee."

Section 5.4 of the Act specifically guarantees the right of supervisory employees to organize—i.e., "...and the fact that any organization has such supervisory members as employees shall not deny the right of that organization to represent the appropriate unit in collective negotiations." It further provides such units "shall be defined with due regard for the community of interest" and that PERC "shall not intervene in matters of recognition and unit definition except in the event of a dispute." In sum, the statute provides that supervisory employees may organize collective bargaining units which may include, in accordance with the definition of "supervisory employee" and due regard for the "community of interest," both principals and supervisors.

In interpreting the statute, PERC has upheld the appropriateness of broad base supervisory units. This position is consistent with the New Jersey Supreme Court's holding in *Board of Education of West Orange v. Wilton*, 57 *N.J.* 404 (1971). In reaching its decision, the Court asserted that among employees who constitute an ap-

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[1] For example, see: *In re Old Bridge Bd. of Ed.*, PERC No. 85-9, 11 *NJPER* 16017; *In re Walwick Bd. of Ed.*, D.R. No. 82-5, 7 *NJPER* 12221; *In re Cinnaminson Twp. Bd. of Ed.*, D.R. No. 81-39, 7 *NJPER* 12122.

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propriate bargaining unit, there should be a clear and discernible community of interest; however, it further reasoned that not all supervisors in a school system, regardless of their status with respect to each other, possess a community of interest *per se* which require or justify their inclusion in the same unit. Where substantial or actual potential conflict of interest exist among supervisors with respect to their duties and responsibilities in relation to each other, the Court held that the requisite community of interest would be lacking, pointing out that:

> *"...If performance of the obligations or powers delegated by the employer to a supervisory employee whose membership in the unit is sought creates an actual or potential substantial conflict between the interests of a particular supervisor and the other employees, the community of interest required for inclusion of such supervisor is not present. While a conflict of interest which is* de minimis *or peripheral may in certain circumstances be tolerable, any conflict of greater substance must be deemed opposed to the public interest."*

As a result, such a comprehensive unit would not be appropriate within the meaning of the Act unless the conflict among unit members is relatively minor.

In the instant case, the Court concluded that it was the responsibility of the Public Employment Relations Commission to determine unit appropriateness. Accordingly, the case was remanded to PERC for further consideration, but was never adjudicated because the matter was withdrawn by the Petitioner.

Since *Wilton, supra,* PERC has undertaken this responsibility by sanctioning comprehensive supervisory bargaining units. *In re Long Branch Board of Education,* E.D. No. 47 (1974), the Commission held that a unit of principals, vice principals, and supervisors was appropriate since all administrators were under a common supervisory structure, the Board recognized the employees as a management team, and the titles shared common work objectives.

The Director of Representation also found in *In re Lakewood Board of Education,* D.R. No. 78-44, 4 *NJPER* 4105, that a unit of department chairmen, educational specialists, assistant principals, and principals was appropriate. In reaching his conclusion, the Director reasoned as follows:

> *"Department Chairpersons and Educational Specialists are supervisors within the Act due to the effective recommendations made by these personnel with respect to the hiring of new personnel and the retention of nontenured personnel. These supervisory employees share a substantial community of interest with the Association's unit members, often working in conjunction with unit members in areas of curriculum determination and teacher evaluation."*

The Director's ruling further rejected the Board's contention that the evaluation of department chairpersons by principals produced a conflict of interest on the basis that similar evaluation of assistant principals by principals, both of whom were undisputed unit members, had not shown a conflict of interest.

Likewise, in *In re Delaware Valley Regional High School District Board of Education,* D.R. No. 79-15, 7 *NJPER* 12234, a unit of a principal and administrative assistant was found appropriate.

PERC reached similar conclusions in *In re Edison Township Board of Education,* D.R. No. 82-8, 7 *NJPER* 12248, and in *In re North Bergen Board of Education,* D.R. No. 84-8, 9 *NJPER* 14263. In the former case, the Director of Representation held that supervisors may remain in a unit with principals since, in the instant situation, neither a supervisory relationship existed between supervisors and principals nor did the responsibilities present either an actual or potential substantial conflict of interest. Thus, because the evidence established only a *de minimis* conflict of interest between principals and vice principals as opposed to a substantial conflict, vice principals could also remain in the unit:

> *"The mere finding of an evaluative responsibility does not,* per se, *give rise to the conclusion that there is a potential for substantial conflict. Had the Court in* Wilton *believed that the mere finding of an evaluative function would necessarily result in a finding of actual or potential substantial conflict of interest, it would not have remanded the* Wilton *matter to the Commission for a full factual review of this issue."*

The Director qualified his decision, however, by adding that he could not predict whether another conclusion might not be reached if a different factual record concerning the relationship between the unit members had been demonstrated.

In the latter case, the Director, citing both *Lakewood, supra,* and *Edison, supra,* reached a substantively similar conclusion—i.e., that no actual or potential substantial conflict existed between department chairpersons and other members of the existing supervisory unit which would prevent them from being represented in the same bargaining unit. This decision was further supported by the Hearing Officers findings: "...that the issue presented related to supervisors of fellow supervisors, as opposed to supervisors of nonsupervisors," and "that the performance of some evaluative function, *per se,* would not establish the circumstances that would demonstrate the need to separate the different levels of supervisors."

The key element in determining the appropriateness of a position for inclusion in a bargaining unit is the extent or degree of the conflict of interest. As per the *Wilton* standard, the charging party must demonstrate that the conflict of interest is "substantial" in order to either (1) remove a position from an existing unit or (2) avert the recognition of a newly created or previously unrepresented position. Whether a conflict is "actual" or "potential" is apparently incidental to the outcome.

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In either instance, the final determination of cases arising out of allegations of "actual" or "potential" substantial conflict of interest will be difficult to substantiate. This conclusion is based upon PERC's position that where a long-standing, successful bargaining history is demonstrated, the Commission will reject "speculative conflict" in favor of the parties "actual experience." *In re City of Trenton*, D.R. No. 83-33, 9 *NJPER* 14172. In other words, if the charging party can prove, based on the record, that a conflict of interest is "substantial," the position in question may be deemed to be inappropriate; on the other hand, if past experience indicates a positive bargaining relationship, then such allegations will most likely be rejected.

Such was the case recently in *In re Mainland Regional Board of Education*, PERC No. 87-79, 13 *NJPER* 18032, where PERC held that since the "principal and vice principals have been in the same negotiations unit for over a dozen years and that unit has functioned smoothly and without significant conflict," the comprehensive unit of principal and vice-principals, in the instant situation, is appropriate for collective bargaining.

Interestingly, PERC reached this conclusion notwithstanding evidence of "an actual conflict of interest in the past" due to the principal's role to informally resolve the grievance of another unit member at level one of the grievance procedure. In reaching its decision, PERC found the conflict to be *de minimis*—i.e., "we do not believe that this possibility under the facts of this particular case warrants removing the principal from that unit." However, to minimize the negative impact of said conflict, PERC (in a footnote to its decision) advises: "To protect against this possibility, the Board may condition any informal resolution of a vice-principal's grievance at step one upon the Superintendent's approval."

Similarly, in a companion case, *In re Roselle Park Board of Education*, PERC No. 87-80, 13 *NJPER* 18033, the Commission dismissed the Board of Education's clarification of unit petition to remove departmental supervisors from an existing unit of supervisors, assistant principals, and principals with a twenty year bargaining history. Despite Board assertions that tension between segments of the bargaining unit constituted an "actual" conflict of interest which required severence, PERC (relying upon an earlier case, *In re Clifton Board of Education*, D.R. No. 80-18, 6 *NJPER* 11020) declined to find a conflict of interest on the basis that "this not infrequent occurrence raises an issue of 'competing interests' and, therefore, does not warrant the severance of employees from an appropriate unit."

Roselle Park, supra, also addressed the issue of "potential" conflict of interest which arose as a result of the Association's petition to clarify the existing unit of administrators and supervisors to include the newly created title of Supervisor of Curriculum/Instruction and Funded Programs. As one might expect, the Commission granted the Association's request for inclusion. Relying upon the Hearing Officer's decision, it was determined that the "nature and degree" of supervision exercised over other unit members did not meet the *Wilton* standard because the position in question was on the same level of the organizational structure as the other unit members whereas in the *Wilton* case, *supra*, Elizabeth Wilton was directly responsible to the Board to supervise the work of nine elementary principals, to evaluate their performance, and make effective recommendations to the Superintendent with regard to tenure and salary.

Despite PERC's consistent stand favoring comprehensive, supervisory bargaining units, in each instance the Commission must carefully weigh the employees "community of interest" against an actual or potential substantial conflict of interest. Most cases appear on the surface to fall under the latter principle but under scrutiny have been deemed to meet the *de minimis* standard.

This is not to say that PERC will not judge a specific supervisory position as inappropriate for inclusion in a particular unit. In an earlier case, *In re Parsippany-Troy Hills Township Board of Education*, D.R. No. 79-7, 4 *NJPER* 4177, PERC ruled to exclude at the end of the currently existing contract both the director of secondary education and the director of elementary education from an existing unit of principals and supervisors. In reaching his decision, the Director of Representation adopted the Hearing Officer's findings that the two positions entailed such duties as to create substantial potential conflict of interest with other members of the unit so as to make inclusion inappropriate. This conclusion was based upon a multifaceted application of conflict of interest as opposed to a singular issue approach. For example, according to the record, the director of secondary education was to become the immediate supervisor of the high school principals. The individual holding the position would be responsible for evaluating principals, processing grievances both at the informal level and the initiation of formal grievances at level two, and utilized by the Board in future contract negotiations.

It was uncontested that the director of elementary education, when the position was filled, would perform the same basic role with regard to the elementary principals as the director of secondary education performed at his level. In this respect, both positions clearly required the performance of duties more similar to assistant superintendent than to other members of the bargaining unit.

Wilton, supra, mandates that where a particular employee in the performance of his/her duties has an "intimate relationship" with managerial functions, the actual or potential substantial conflict arising from such duties may make that employee's inclusion in a supervisory unit inappropriate. An employee functioning as a management agent possesses the capacity to substantially adversely effect fellow unit members. This concern is reflected in the Employer-Employee Relations Act, in which the legislature resolved to exclude "managerial executives" from the Act. Moreover, *N.J.S.A.* 34:13A-3(f) specifically defines such executives:

"*'Managerial executives' of a public employer means* *persons who formulate management policies and practices, and persons who are charged with the responsibility of directing the effectuation of such management policies and practices, except that in any school district this term shall include only the superintendent or other chief administrator, and the assistant superintendent of the district."*

An analysis of *Parsippany-Troy Hills, supra,* reveals that the excluded positions carried job responsibilities more similar to assistant superintendent than to those of other unit members. Both the extent and degree of job responsibilities apparently led PERC to its conclusion of potential substantial conflict based upon its interpretation of *Wilton, supra,* and the statute. In so doing, a distinction is made between the circumstances in *Parsippany-Troy Hills, supra,* and the other cases cited herein in which the Commission upheld the appropriateness of comprehensive supervisory units. Whereas PERC has sanctioned inclusion of positions in supervisory units in which potential or actual conflict of interest among members exists, only when such conflict has been demonstrated to be "substantial" has the Commission, on a case-by-case basis, declare contested positions inappropriate. As enunciated in *Edison, supra:* "The mere finding of an evaluative responsibility does not, *per se,* give rise to the conclusion that there is a potential for substantial conflict."

Unlike the clearly discernible criteria governing the severance of supervisory positions from a nonsupervisory bargaining unit, no one specific rule can be applied in the instant situation. The fact that supervisors may report to principals on a line-staff organizational chart does not, in and by itself, warrant an automatic finding of an inappropriate unit.

In the absence of explicit rules, the following general guidelines should assist Boards of Education who consider filing a petition with PERC for purposes of clarifying a supervisory unit; these recommendations are:

- Always remember that it is the actual job duties and responsibilities, not the job title or position, that PERC will evaluate.
- The greater the extent and degree of conflicting job responsibilities with other unit members, the more likely determination of the relationship will be deemed "substantial"; however, the record clearly indicates that PERC's preference for broad-based units based upon a community of interest, appears to outweigh most assertions of "substantial" conflict.
- Given the absence of statutory prohibition, the burden of demonstrating a substantial conflict of interest will be greater in the case of clarifying a supervisory bargaining unit than in the case of removing a supervisor from a nonsupervisory unit. In the latter case, one need only to prove that the employee is a supervisor as defined by the Act, in the former case, one must demonstrate that a substantial conflict of interest exists. Thus, applying the same reasoning for removing a supervisory employee from a nonsupervisory unit to substantiate his/her removal/exclusion from a supervisory unit may be insufficient.

By utilizing these guidelines, a local Board should be able to accurately assess the merits of its case before proceeding to litigation. Although PERC will render its decision on a case-by-case basis, one may assume, based on the record, that the Commission will examine and evaluate each unique set of circumstances in a manner consistent with the concepts and opinions described herein.

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DECISIONS AFFECTING NEGOTIATIONS

Listed below are a number of court and PERC decisions which affect at-the-table bargaining behavior.[1]

Authority of a Board's Negotiating Team

Bergenfield Board of Education and Bergenfield Education Association, PERC No. 90, 1 ***NJPER*** 44. Unless otherwise noted, a board's negotiating team can bind the entire board to a tentative agreement.

Duty to Bargain in Good Faith

Galloway Township Board of Education v. Galloway Township Education Association, 78 ***N.J.*** 25 (1978). The duty to negotiate changes in terms and conditions of employment exists during the life of an existing agreement.

State v. N.J. Council of State College Locals, 141 ***N.J. Super.*** 470 (App. Div. 1976). The obligation to negotiate in good faith does not include an obligation to make a concession on any given issue or to agree to the proposal of the other party.

Waiver/Suspension of Duty to Bargain

Caldwell-West Caldwell Education Association v. Caldwell-West Caldwell Board of Education, 180 ***N.J. Super.*** 440 (App. Div. 1980). Certain minor, nonrecurrent types of work load increases which do not lengthen the negotiated workday and which stem directly from an educational policy decision are nonnegotiable.

County of Middlesex (Roosevelt Hospital) and Communication Workers, Local 1065 and Roosevelt Hospital Association Inc., PERC No. 81-129, 7 ***NJPER*** 12118. A public employer must suspend bargaining with the majority representative during the pendency of a bonafide representation dispute.

New Jersey Institute of Technology and Newark College of Engineering Professional Staff Association, PERC No. 80-27, 5 ***NJPER*** 10202. Where increases in work load are "inescapably intertwined with and inseparable from" an educational policy decision, negotiations over the increased work load are not required.

Rutgers, The State University and AFSCME, Council 52 and Local 1761, PERC No. 80-26, 5 ***NJPER*** 10201. Clear contract language can constitute a waiver by the union of its right to negotiate change in working hours.

Woodstown-Pilesgrove Regional High School District Board of Education v. Woodstown-Pilesgrove Regional Education Association, 81 ***N.J.*** 582 (1980). The effect of a management decision on terms and conditions of employment is not automatically negotiable, but depends upon whether the dominant issue primarily involves either an educational policy decision or a term and condition of employment.

Employer Conduct During Impasse

City of Jersey City and Local 246, Jersey City Public Employees, Inc., PERC No. 77-58, 3 ***NJPER*** 122. If a genuine impasse still exists after the parties have exhausted PERC's dispute resolution procedures, the employer may implement his last offer.

Galloway Township Board of Education and Galloway Township Education Association, 78 ***N.J.*** 1. A public employer may not refuse to pay increments contained in an expired agreement while negotiations are continuing for a successor agreement.

Piscataway Township Board of Education and Piscataway Township Education Association, PERC No. 91, 1 ***NJPER*** 49. A public employer may not alter the status quo of an expired contract while still negotiating a successor contract.

Scope of Negotiations

(Also check specific clauses in the "NJSBA Analysis of the NJEA Sample Agreement for 1986-87," at p.41)

Assignments:

Carteret Education Association v. Carteret Board of Education, Docket No. A-419-79, unpublished App. Div. opinion, decided November 10, 1980. The decision to assign teachers to after school workshops that do not involve student supervision is a mandatorily negotiable term and condition of employment.

Long Branch Education Association, Inc. v. Board of Education of the City of Long Branch, Monmouth County, 150 ***N.J. Super.*** 262, affirmed, 73 ***N.J.*** 461 (1977). Assignment of teachers to lunchroom supervision is an educational policy decision, and is nonnegotiable.

Ramapo-Indian Hills High School District Board of Education v. Ramapo-Indian Hills Education Association, 176 ***N.J. Super.*** 35 (App. Div. 1980). Decision to assign teachers to extracurricular activities and the work hours normally associated with these activities are nonnegotiable.

Definition of Scope:

Paterson Police P.B.A., Local No. 1 v. City of Paterson, 87 ***N.J.*** 78 (1981). Even though a permissive category of negotiations for police and firefighters is constitutional, this category is narrowly restricted so as to preclude negotiations on matters which place "substantial limitations" on the governmental body's policy-making authority.

Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 ***N.J.*** 144, (1978). C.123 did not create a permissive category. Transfers, for example, are nonnegotiable.

State of New Jersey v. State Supervisory Employees Association, State of New Jersey v. Local 195 IFPTE and Local 518 SEIU, 78 ***N.J.*** 54, (1978). General statutes giving authority to employers do not render negotiations over terms and conditions illegal. Specific statutes and regulations that govern terms and conditions of employment cannot be abrogated by contract.

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[1] PERC or the courts can alter case law at any time. Before relying on these decisions, please check to determine if they have been modified since the publication of this book. In addition, please keep in mind that this list is far from exhaustive and represents only a few decisions affecting selected bargaining issues.

Discipline:

Bergen County Law Enforcement v. Bergen County Freeholder Board, 191 ***N.J. Super.*** 319 (App. Div. 1983). Civil Service employees do not possess statutory protection with respect to a review of minor disciplinary determinations and, therefore, binding arbitration is a legal procedure for filling this gap.

CWA v. PERC and City of East Orange; County of Atlantic v. Jersey Nurses Economic Security Organization, N.J. State Nurses Association; Willingboro v. Employees Association of Willingboro Schools; Toms River Board of Education v. Toms River School Bus Drivers Association; and County of Morris v. Council No. 6, NJCSA, 193 ***N.J. Super.*** 658 (App. Div. 1984), cert. den. ___ ***N.J.*** ___ (1984). Review procedures for minor disciplinary actions taken against Civil Service employees and for disciplinary actions taken against nontenured, non-Civil Service employees are negotiable and arbitrable, as those employees do not have alternate statutory appeal procedures.

East Brunswick Board of Education and East Brunswick Education Association, Docket No. A-5596-83T6, unpublished App. Div. opinion, decided March 19, 1985, cert. den. ___ ***N.J.*** ___ (1985). Withholding of increments for nonteaching staff members are disciplinary determinations which may proceed to binding arbitration, as these employees have no alternate statutory appeal procedures.

Holland Township Board of Education and Holland Township Education Association, PERC No. 87-43, 12 ***NJPER*** 17316. In reviewing the arbitrability of disciplinary disputes involving teaching staff members, PERC will determine, based upon the specific facts of each case, whether the dispute predominantly involves an evaluation of teaching performance or a disciplinary sanction. Only those cases involving disciplinary actions will be permitted to proceed to binding arbitration.

Evaluations:

Bethlehem Township Board of Education v. Bethlehem Township Education Association, 81 ***N.J.*** 38 (1982). Tenured teacher evaluation procedures are negotiable as long as contracts do not conflict with State Board of Education rules. Related educational policy questions are nonnegotiable.

Hazlet Township Board of Education v. Hazlet Township Teachers Association and Public Employment Relations Commission, Docket No. A-2875-78, unpublished App. Div. opinion, decided March 27, 1980. The application of evaluation criteria is not negotiable or arbitrable.

Teaneck Board of Education v. Teaneck Teachers Association, 161 ***N.J. Super.*** 75 (App. Div. 1978). Criteria for evaluation and the content of evaluations cannot be negotiated.

Pregnancy-Related Disability Leaves and Sick Leave Benefits During Childcare Leaves:

Board of Education of Cinnaminson v. Silver, 1976 ***S.L.D.*** 738, aff'd State Board, 1979 ***S.L.D.*** 817. Employees are entitled to use their accumulated sick leave because of pregnancy-related disability.

Castellano v. Linden Board of Education, 79 ***N.J.*** 407 (1979). Employers may neither deny employees with pregnancy-related disabilities the right to use accumulated sick leave nor establish a mandatory leave policy for pregnant teachers.

Dyson v. Montvale Board of Education, 1980 ***S.L.D.*** 833 affirmed, State Board 1981 ***S.L.D.*** ___ (March 3), affirmed, Docket No. A-3182-80T1, unpublished App. Div., decided February 8, 1982. A board may place an employee anticipating a disability leave on an involuntary unpaid leave prior to the disability period in order to protect educational continuity and avoid midsemester staffing changes, but the employee will remain entitled to sick leave pay for the period of actual disability.

Gilchrist v. Board of Education of Haddonfield, 155 ***N.J. Super.*** 358 (App. Div., 1976). Nonrenewal of nontenured pregnant teachers based on board policy minimizing classroom instruction interruptions is not discriminatory.

Hackensack Board of Education v. Hackensack Education Association, 184 ***N.J. Super.*** 311 (App. Div. 1982). According to the statutory provision on sick leave, sick leave may not be used for child rearing purposes by a nondisabled employee.

Logandro v. Cinnaminson Township Board of Education, 1979 ***S.L.D.*** 378, affirmed in part, State Board, 1980 ***S.L.D.*** 1511 (June 27); ***Headley v. Board of Education of the Township of Jefferson,*** 1981 ***S.L.D.*** ___ (Feb. 4), affirmed Docket No. A-2804-80, unpublished App. Div. opinion, decided Nov. 17, 1981. An employee who takes a voluntary leave of absence prior to his or her period of actual disability is not entitled to use sick leave during the period of actual disability.

Reduction in Force:

Cinnaminson Township Board of Education v. Cinnaminson Teachers' Association, affirmed in part, Docket No. A-2682-77, unpublished App. Div. opinion, decided June 1, 1979, cert. denied 81 ***N.J.*** 341 (1979). The decision to RIF, and the incidental "impact," are nonnegotiable.

Englewood Board of Education v. Englewood Teachers' Association, 150 ***N.J. Super.*** 265 (App. Div. 1977). The statutory power to reduce personnel cannot be the subject of negotiation or arbitration.

Maywood Board of Education v. Maywood Education Association, 168 ***N.J. Super.*** 45, cert. denied 81 ***N.J.*** 292 (1979). Impact of a RIF on the work-load of remaining employees is nonnegotiable.

Township of Old Bridge Board of Education, 193 ***N.J. Super.*** 182 (App. Div. 1984), affirmed 98 ***N.J.*** 523 (1985). Although RIF notice provisions are negotiable and arbitrable, such negotiated provisions may not prevent boards of education from reducing their work force as provided under ***N.J.S.A.*** 18A:28-9.

Sick Leave, Personal Leave, and Retirement:

Fair Lawn Education Association v. Fair Lawn Board of Education v. Teachers' Pension and Annuity Fund, Division of Pensions, Department of Treasury, State of New Jersey, 161 ***N.J. Super.*** 67, affirmed, 79 ***N.J.*** 574 (1979). Retirement incentive plans are illegal.

Hunterdon Central High School Board of Education v. The Hunterdon Central Regional High School Teachers' Association, 86 ***N.J.*** 43 (1981). Payment for religious observance without charging the leave to general personal leave or vacation time is unconstitutional.

Piscataway Township Board of Education v. Piscataway Maintenance and Custodial Association, 152 ***N.J. Super.*** 235 (App. Div. 1977); ***Ramsey Teachers Association v. Board of Education of the Borough of Ramsey,*** unpublished App. Div.

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opinion, decided May 30, 1980. Blanket, extended sick leave contract clauses are illegal and unenforceable.

Piscataway Township Board of Education and Piscataway Education Association, PERC No. 82-64, 8 ***NJPER*** 13039. The establishment of a policy enabling the board to verify illness for which sick leave is claimed is not negotiable or arbitrable. However, the application of the policy may be subject to the contractual grievance procedure.

Subcontracting:

Local 195, IFPTE, AFL-CIO v. State of New Jersey, 176 ***N.J. Super.*** 85 (App. Div. 1980), affirmed in part, 88 ***N.J.*** 393 (1982). Subcontracting unit work to an outside contractor is not a required topic for negotiations.

Rutgers, The State University v. AFSCME, Council 52 and its Affiliate, Local Union No. 1761, Docket No. A-468-81T1, unpublished App. Div. decision, decided May 18, 1983. Shifting unit work from employees within the unit to other employees outside the unit is distinguishable from subcontracting and is a mandatory topic of negotiations.

Tenure:

Claude Wright, Jr. v. East Orange Board of Education, 194 ***N.J. Super.*** 181 (1984), affirmed ____ ***N.J.*** ____ (1985). Tenure for school custodians is mandatorily negotiable. A contract clause granting tenure after three years is enforceable despite fixed term contract.

Work Load and Work Year:

Melvin Sanders v. East Orange Board of Education, unpublished App. Div. opinion, Docket No. A-3907-81T3, decided October 5, 1983. Where reasons for a department reorganization, which results in a decreased work year, are independent of the board's desire to reduce an employee's work year, said reduction is a nonnegotiable managerial prerogative.

Newark Board of Education v. Newark Teachers' Union, Local 481, A.F.T., ALF-CIO, Docket No. A-2060-78, unpublished App. Div. opinion, decided Feb. 26, 1980. Change in preparation periods constitutes a change in work load and is, therefore, mandatorily negotiable.

Piscataway Township Board of Education v. Piscataway Township Principals' Association, 164 N.J. Super. 98 (App. Div. 1978). The decision to reduce the work year from 12 months to 10 months is a required topic of negotiations.

Scope of Grievability

Bernards Township Board of Education v. Bernards Township Education Association, 79 ***N.J.*** 311 (1979). Withholding of an increment is not grievable to binding arbitration. Parties may negotiate advisory arbitration procedures to cover management prerogatives affecting individual employees.

Teaneck Board of Education v. Teaneck Teachers Association, 94 ***N.J.*** 9 (1983). Claims of racial discrimination in public employment may not proceed to binding arbitration; claims may proceed to advisory arbitration and to the Division of Civil Rights.

Township of West Windsor v. Public Employment Relations Commission and P.B.A. Local 130, 78 ***N.J.*** 98, (1978). The terms of all negotiated grievance procedures must "cover" grievances concerning the interpretation, application, or violation of policies, agreements and administrative decisions affecting terms and conditions of employment.

Unit Determination

Cinnaminson Township Board of Education and Cinnaminson Township Teachers' Association, D.R. No. 81-39, 7 ***NJPER*** 12122. Department heads may be excluded from a teachers' bargaining unit when the board adopts a new job description which places department heads in a supervisory capacity over teachers.

Piscataway Township Board of Education and Piscataway Township Education Association, PERC No. 84-124, 10 ***NJPER*** 15134. Teachers and support staff share a community of interest, and in disputed cases, separate units should generally be given the opportunity to vote on merger into a single unit.

Ramapo-Indian Hills Regional Board of Education and Ramapo-Indian Hills Education Association, D.R. No. 81-26, 7 ***NJPER*** 12048. Department heads who are declared supervisors under the Act may be excluded from teachers' bargaining unit.

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NJSBA ANALYSIS OF THE NJEA SAMPLE AGREEMENT

This portion of **Negotiations 86-87** is devoted to our latest analysis of the NJEA Sample Agreement. Each year the analysis is updated to reflect the most recent changes in the laws governing negotiations and shifting patterns in bargaining demands. Use our analysis when reviewing your present contract as you prepare for negotiations, and when reviewing the union's proposals and counterproposals.

In addition, be certain to analyze any proposed changes in your present contract **in the context of the rest of the contract.** A particular proposal might be acceptable on its own, but becomes unacceptable when viewed in tandem with other parts of the contract.

On the left of each page appears the text of the NJEA Sample Agreement. On the right of each page appears our commentary. References to **PERC** refer to **What Every School Board Member Should Know About the PERC Law** (copyright 1979, NJSBA); references to **Administering the Negotiated Agreement** refer to Volume 7 in NJSBA's School Board Library Series (copyright 1980).

BEST COPY AVAILABLE

PREAMBLE

This Agreement entered into this day of
19 , by and between the Board of Education of ,The City
of , New Jersey, hereinafter called the "Board," and
Association, hereinafter called the "Association."

This section notes the date the contract was entered and is standard and acceptable.

WITNESSETH:

WHEREAS, the Board and the Association recognize and declare that providing a quality education for the students of the School District is their primary aim and that the character of such education depends predominantly upon the quality of teaching, the availability of materials, the functional utility of facilities, the release of imagination in planning, the application of democratic processes in administration, and the maintenance of high morale among the teaching faculty, and

WHEREAS, the members of the teaching profession are particularly qualified to advise the formulation of policies and programs designed to improve educational standards, and

WHEREAS, the Board has an obligation, pursuant to Chapter 303, Public Laws 1968 to negotiate with the Association as the representative of employees hereinafter designated with respect to the terms and conditions of employment, and

The primary purposes of a labor agreement are: (1) to state the terms and conditions of employment of employees; (2) to place limitations on the ability of the employer to change those terms and conditions; and (3) to specify certain kinds of duties or requirements of employees. If a clause in the contract does not fulfill one or more of these purposes, it is extraneous.

The first two whereas clauses are illegal topics of negotiation. **Fairview Board of Education,** PERC No. 80-18.

The clauses in this section are extraneous. It is better deleted inasmuch as it may be used by an arbitrator or other third party to modify the meaning of the Agreement. The General Counsel of the NEA states: *"From a strict legal point of view they are not necessary. They may, however, be viewed by an arbitrator or a court as providing a clue to the intention of the parties in construing ambiguous provisions in the agreement. If such statements are to be included, therefore, the language should be carefully drafted."* (See **The Law and Practice of Teacher Negotiations,** 3:16, cited in **Bibliography,** earlier.)

WHEREAS, the parties have reached certain understandings which they desire to confirm in this Agreement, be it

RESOLVED, in consideration of the following mutual covenants, it is hereby agreed as follows:

This is standard language.

Article I, *Recognition*

A. Unit

The Board hereby recognizes the Association as the exclusive and sole representative for collective negotiation concerning grievances and terms and conditions of employment for all personnel whether under contract, on leave, on a per diem basis, employed or to be employed by the Board, but excluding:

(Insert positions excluded from the negotiating unit.)

The definition of the bargaining unit is very important. The board has the same right as the union to insist upon the proper negotiation unit. The unit should be limited to classifications of employees which have what is called a "community of interest." In a teachers' unit, this would include all certificated teaching personnel under contract. The unit may also include nurses, psychologists, and social workers. The unit will differ from district to district.

In 1985-86, 31% of the state's districts had "mixed units" containing certificated personnel and some or all of the non-professional employees in the district. (For a further discussion of Recognition Clauses and "mixed units" see "Negotiating With

Comprehensive Units" in **Negotiations 85**).

Under Chapter 123, the superintendent and assistant superintendent must be excluded from all bargaining units. Confidential employees also are excluded from bargaining units under Chapter 123. Supervisors, such as principals and department chairpeople, have bargaining rights under the Act. However, a unit formed after 1968, cannot contain supervisors and non-supervisors. PERC has held that persons designated to evaluate teachers are supervisors under the Act and may not remain in the teachers' bargaining unit. **Cinnaminson,** D.R. No.81-39. Should the board have any questions concerning the appropriateness of the bargaining unit as constituted, it may file with PERC a petition for clarification of unit.

For more information on bargaining units, see "Bargaining Units: Consolidation, Severance, and Additions," in **Negotiations 1983** and "Determination of the Appropriate Supervisory Bargaining Unit" on p.32.

B. Definition of Teacher

Unless otherwise indicated, the term "teachers," when used hereinafter in this Agreement, shall refer to all professional employees represented by the Association in the negotiating unit as above defined, and references to male teachers shall include female teachers.

Paragraph B means that every right granted a classroom teacher applies equally to all professionals who are not classroom teachers. The board may wish to reserve certain rights and privileges only to classroom teachers and/or to full-time employees, such as preparation periods or tuition reimbursement. Whether or not you have such a definition, be careful to specify when a contract clause does not apply to all employees.

Article II, *Negotiation of Successor Agreement*

A. Deadline Date

The parties agree to enter into collective negotiation over a successor Agreement in accordance with Chapter 123, Public Laws 1975 in a good-faith effort to reach agreement on all matters concerning the terms and conditions of teachers' employment. Such negotiations shall begin not later than August 1 of the calendar year preceding the calendar year in which this Agreement expires. Any agreement so negotiated shall apply to all teachers, be reduced to writing, be signed by the Board and the Association, and be adopted by the Board.

Under the Rules and Regulations of PERC, the beginning date for negotiations on successor agreements is 120 days prior to the school budget election date. With school elections scheduled for the first Tuesday in April, local successor negotiations should technically begin during the first week of December. The parties may agree to begin at an earlier, or a later, date.

The Sample Agreement would begin bargaining on or before August 1st. Generally it is better for boards to begin negotiations late in the Fall. If proposals are exchanged in

December and actual negotiations are begun in January, so much the better. Beginning negotiations earlier than this will not lead to an earlier settlement; it will mean more hours at the bargaining table, and may mean more concessions by the board along the way.

Regarding the last sentence: you should always notify the union prior to negotiations that the full board of education retains the right to ratify or reject any agreements reached during negotiations. Boards should not agree to the last sentence as it implies that the full board waives its right to ratify the tentative agreement reached by its negotiating team.

B. Grants from Federal or State Agencies

The Board agrees that the procedure set forth in this ARTICLE shall be applicable to the determination and implementation of the grants to be requested by the Board pursuant to any federal and/or state laws, provided; however, that the relevant time-table shall be shortened if necessary to comply with time requirements in making or processing applications under the relevant federal or state laws.

C. Increase in State Aid

The Board agrees to reopen negotiations and permit amendments to any section of this Agreement whenever state and/or federal funds in addition to and/or in excess of those amounts previously anticipated for the fiscal year(s) covered by this Agreement have been appropriated. The Board shall so inform the Association within five (5) days of its notification of the amounts to be received in such subsequent state and/or federal appropriation.

Boards should reject B. and C. These call for automatic reopening of a contract in certain circumstances. When the contract is reached, it is preferable that it resolve all issues for its entire term. No mention is made, it is noted, of reopening negotiations in the event of a **decrease** in State or Federal aid. Very few New Jersey boards have agreed to such clauses. Inclusion of this clause in an existing 1985-86 contract would have obligated the Board to reopen negotiations in 1985 for the distribution of state aid received pursuant to the $18,500 Law. (See "The Teacher Quality Employment Act, p.17)

D. Modification

This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties.

Section D. is a standard clause and should be retained in the agreement.

Article III, *Grievance Procedure*

The grievance procedure may be the most important section of any contract. Ideally, a grievance procedure will define a grievance, identify who may file a grievance, set a time limit on the filing of a grievance and detail individual steps through which a grievance must pass. Grievance procedures can provide a positive means for resolution of disputes.

For a thorough analysis of the legal and practical considerations that affect grievance procedures, see **Administering the Negotiated Agreement,** pp. 1-24. This book also contains a sample grievance

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A. Definitions

1. Grievance

A "grievance" is a claim by a teacher or the Association based upon the interpretation, application, or violation of this Agreement, policies or administrative decisions and practices affecting a teacher or a group of teachers.

procedure at Appendix D which modifies much of the NJEA Sample Agreement language to make it more workable for school boards and administrators.

The definition of a grievance should be limited to the **mandatory definition of grievance** established in the Supreme Court's **West Windsor** decision, 78 **N.J.** 98 (1978). In that case the Court stated that all grievance procedures must permit grievances over the interpretation, application or alleged violation of negotiated agreements, board policies and administrative decisions affecting employees' **terms and conditions of employment.** A later case **permits** employers to negotiate a grievance procedure over non-terms and conditions of employment, such as class size, as long as such a procedure **does not end in bringing arbitration. Bernards Township,** 79 **N.J.** 311 (1979).

Therefore, if a board agrees to the definition contained in the sample agreement, it risks having PERC or an arbitrator interpret it to allow grievances over **virtually any topic at all,** as long as such grievances do not proceed to binding arbitration. This risk is especially high if your present grievance procedure ends in **advisory arbitration.** See **Watchung Hills Regional,** PERC No. 81-86.

To avoid this problem, delete the NJEA Model Agreement phrase, "a teacher or group of teachers" and substitute, "the terms and conditions of employment of a teacher or group of teachers."

Even with this definition of a grievance, a board should not agree to permit all such grievances to go to binding arbitration. (Binding arbitration, of course, is a negotiable topic, **not** a mandate. You may have binding arbitration for some, all or none of the grievances in your district that concern terms and conditions of employment.)

Boards which have agreed to an arbitration clause should only agree to submit grievances to binding arbitration which arise under the express terms of the agreement. Grievances over "board policies and administrative decisions and practices" should not fall under an arbitration clause.

Grievances concerning "policies" should start and end with the board. Grievances concerning "administrative decisions" might start with the administrator responsible for the decision and end with the board. Grievances over statutes and regulations should start with the superintendent and end at the board, subject to appeal to the appropriate administrative agency. See **Administering the Negotiated Agreement,** pp. 18-23.

Boards should avoid agreeing to a grievance definition that includes "practices" as grievable, because the word is too ambiguous: consistent practices, known practices, building practices, grade practices, random practices or individual supervisor practices?

2. Aggrieved person

An "aggrieved person" is the person or persons or the Association making the claim.

3. Party in interest

A "party in interest" is the person or persons making the claim and any person including the Association or the Board, who might be required to take action or against whom action might be taken in order to resolve the claim.

Who May File a Grievance: The Supreme Court decided on August 3, 1978, that the majority representative union has the constitutional and statutory right to present grievances on behalf of employees, and that this right cannot be waived through contrary contractual language. The case, involving the **Red Bank Regional Board of Education,** 78 **N.J.** 122, thus prohibits the negotiation of a clause to restrict the filing of grievances to individual employees. The Court decision assumed that individuals have a concurrent right to present grievances themselves; it did not address whether a union can file a grievance against the wishes of the affected employee.

B. Purpose

The purpose of this procedure is to secure, at the lowest possible level, equitable solutions to the problems which may from time to time arise affecting teachers. Both parties agree that these proceedings will be kept as informal and confidential as may be appropriate at any level of the procedure.

The purpose of the grievance procedure is not to achieve "equitable" solutions, but to resolve differences concerning the **rights** of the parties regarding the terms and conditions of employment of the employees covered by the contract. The sample language grants unlimited discretion to an arbitrator to fashion an "equitable" solution according to his or her personal defintion of justice. This is too broad a grant of authority to an arbitrator.

C. Procedure

1. Time limits

The number of days indicated at each level should be considered as a maximum and

Time Limit: The Sample Agreement places rigid time limits on the board's administrative personnel every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement.

2. Year end grievances

In the event a grievance is filed at such time that it cannot be processed through all the steps in this grievance procedure by the end of the school year, and, if left unresolved until the beginning of the following school year, could result in irreparable harm to a party in interest the time limits set forth herein shall be reduced so that the grievance procedure may be exhausted prior to the end of the school year or as soon thereafter as is practicable.

3. Level one—principal or immediate superior

A teacher with a grievance shall first discuss it with his principal or immediate superior, either directly or through the Association's designated representative, with the objective of resolving the matter informally.

4. Level two—superintendent

If the aggrieved person is not satisfied with the disposition of his grievance at Level One, or if no decision has been rendered within five (5) school days after the presentation of the grievance, he may file the grievance in writing with the Association within five (5) schools days after the decision at Level One or ten (10) school days after the grievance was presented, whichever is sooner. Within five (5) school days after receiving the written grievance, the Association shall refer it to the superintendent of schools.

but places no time limit on the grievant. It is in the interest of the parties that a time limitation be placed in the contract. If you find that you do not have enough time at any step to adequately consider a grievance, propose different time limitations. The contracts in the private sector often place a 3 day limit on the initial filing of grievances. While this may seem unduly restrictive, two weeks would not seem so. This time limit should appear prior to or in the first step of the procedure.

The phrase "should be considered" is unnecessary and should be replaced by the word "is."

The Sample Agreement's procedure begins with the principal or immediate superior and goes on to the superintendent. Those boards which have department chairmen may wish to involve these supervisors in the grievance procedure.

The practice in nearly all districts in New Jersey is to provide that the board of education is a formal step in the grievance procedure, hearing grievances appealed beyond the superintendent's level. Most boards feel it is their obligation to receive and act on employee grievances directly.

There is another school of thought, however, which states that a board should engage only in policy-**making** and that grievances are really only concerned with the **implementation** of the board's policies, which is an **administrative** function.

If your board believes that it spends too much time reviewing employee grievances, consider negotiating yourselves out of the process. Instruct your chief school administrator to consult with you on the more complex grievances, and to use his administrative judgment on the others. For some boards, removing themselves from grievances handling may "de-politicize" district labor relations substantially, as well as free up board time for policy functions while buttressing the authority of the administration. It may be particularly appropriate for the board to delete itself from the grievance procedure if most grievances the board handles proceed to arbitration anyway.

The appropriate role for the board in your district's grievance procedure will depend on the number of grievances that arise, your relations with the administration and the union and the other demands on your time.

5. Level three—arbitration

(a) If the aggrieved person is not satisfied with the disposition of his grievance at Level Two, or if no decision has been rendered within ten (10) school days after the grievance was delivered to the superintendent, he may, within five (5) school days after a decision by the superintendent or fifteen (15) school days after the grievance was delivered to the superintendent, whichever is sooner, request in writing that the Association submit its grievance to arbitration. If the Association determines that the grievance is meritorious, it may submit the grievance to arbitration within fifteen (15) school days after receipt of a request by the aggrieved person.

(b) Within ten (10) school days after such written notice of submission to arbitration, the Board and the Association shall attempt to agree upon a mutually acceptable arbitrator and shall obtain a commitment from said arbitrator to serve. If the parties are unable to agree upon an arbitrator or to obtain such a commitment within the specified period, a request for a list of arbitrators may be made to the American Arbitration Association by either party. The parties shall then be bound by the rules and procedures of the American Arbitration Association.

(c) The arbitrator's decision shall be in writing and shall be submitted to the Board and the Association and shall be final and binding on the parties.

Boards differ on whether they desire to have themselves, advisory or binding arbitration as the last step of the grievance procedure. 31% of school boards have not agreed to binding arbitration. No board is required to agree to binding arbitration. Prior to doing so you should be sure that you can operate the school system adequately with the definition of a grievance and the contract clauses to which you have agreed. Binding arbitration can prove harmful especially where you have agreed to a "savings clause," or a "past practice clause." Remember, no matter how responsible you believe the union to be, expect the organization to seek the most favorable (in their eyes) intepretation of a given clause. Can you now live with that interpretation? The amount of no or yes answers you give to this question may help you determine whether you desire to agree to binding arbitration.

If the union is intent on gaining binding grievance arbitration, they should be willing to remove any "past practice" clause. In addition, the board should insist on a "no strike or work stoppage" clause.

In order to limit what may be arbitrated, the contract should contain an express limitation such as the following: *The only grievances which may be arbitrated are those alleging that there has been a violation of the express written terms of the locally negotiated agreement. The arbitrator shall have no authority to rule on grievances which concern the interpretation, application, or alleged violation of board policies and administrative decisions affecting terms and conditions of employment, or of statutes and regulations setting terms and conditions of employment.*

The following language should also be contained in any arbitration clause to limit the arbitrator to his or her proper role: "The arbitrator shall be limited to the issues submitted and shall consider nothing else. The arbitrator can add nothing to nor subtract anything from the Agreement between the parties."

(d) In the event that arbitrability of a grievance is at issue between the parties, jurisdiction to resolve the issue shall rest solely with the arbitrator selected in accordance with the provisions of Section C.5 (b) of this Article.

(e) The costs for the services of the arbitrator, including per diem expenses, if any, and actual and necessary travel, subsistence expenses and the cost of the hearing room shall be borne equally by the Board and the Association. Any other expenses incurred shall be paid by the party incurring same.

D. Rights of Teachers to Representation

1. Teacher and association

Any aggrieved person may be represented at all stages of the grievance procedure by himself, or at his option by representative(s) selected or approved by the Association. When a teacher is not represented by the Association, the Association shall have the right to be present and to state its views at all stages of the grievance procedure.

2. Reprisals

No reprisals of any kind shall be taken by the Board or by any member of the administration against any party in interest, any representative, any member of the Association, or any other participant in the grievance procedure by reason of such participation.

E. Miscellaneous

1. Group grievance

If, in the judgment of the Association, a grievance affects a group or class of teachers, the Association may submit such grievance in writing to the superintendent directly and the processing of such grievance shall be commenced at Level Two. The Association may process such a grievance through all levels of the grievance procedure even though the aggrieved person does not wish to do so.

2. Written decisions

Decisions rendered at Level One which are unsatisfactory to the aggrieved person and all decisions rendered at Levels Two and Three of the grievance procedure shall be in writing setting forth the decision and the reasons therefore and shall be transmitted promptly to all parties in interest and to the Association. Decisions rendered at Level Three shall be in accordance with the procedures set forth in Section C, paragraph 5 (c) of this ARTICLE.

3. Separate grievance file

All documents, communications and records dealing with the processing of a

Boards should not agree to 5.d. This clause is designed to remove PERC and the courts from making decisions on what is negotiable and arbitrable, and is not in the best interest of the board. 5.e. is standard. See **Administering the Negotiated Agreement,** pp. 83-85 and pp. 131-133 for a detailed discussion of arbitrability.

D.1. This is standard language. The first sentence is a paraphrase of law regarding the right to Association representation. It implies, however, that an employee can demand to represent himself during arbitration, not likely the intent of the clause. The second sentence is general labor relations practice.

D.2. is a paraphrase of law. These protections are guaranteed by the law and need not be included in the contract. The inclusion of such a clause implies that, without the clause, the board **would** engage in reprisals against employees for filing grievances. Agreeing to the clause indicates to your staff that the union has won for them protection against board retaliation which, in fact, wouldn't occur anyway.

E.1. Note that the grievances would begin with the supreintendent rather than the principal or immediate supervisor. This would be acceptable, with this addition at the end of the first sentence: *"where the administrator handling grievances at Level One of this procedure does not have the authority to resolve the grievance."*

The second sentence is merely **negotiable** beyond Level One of the procedure. There is no statutory right for a union to process grievances beyond Level One.

E.2. You retain the flexibility to agree on various approaches to your procedure. Some boards have highly formalized procedures, with written answers on prepared forms. Others find an informal approach more useful. Use what works for you.

grievance shall be filed in a separate grievance file and shall not be kept in the personnel file of any of the participants.

4. Forms

Forms for filing grievances, serving notices, taking appeals, making reports and recommendations, and other necessary documents shall be prepared jointly by the superintendent and the Association and given appropriate distribution so as to facilitate operation of the grievance procedure.

5. Meetings and hearings

All meetings and hearings under this procedure shall not be conducted in public and shall include only such parties in interest and their designated or selected representatives, heretofore referred to in this ARTICLE.

Article IV, *Teacher Rights*

A. Rights and Protection in Representation

Pursuant to Chapter 123, Public Laws 1975, the Board hereby agrees that every employee of the Board shall have the right freely to organize, join and support the Association and its affiliates for the purpose of engaging in collective negotiations and other concerted activities for mutual aid and protection. As a duly selected body exercising governmental power under the laws of the State of New Jersey, the Board undertakes and agrees that it shall not directly or indirectly discourage or deprive or coerce any teacher in the enjoyment of any rights conferred by Chapter 123, Public Laws 1975 or other laws of New Jersey or the Constitutions of New Jersey and the United States; that it shall not discriminate against any teacher with respect to hours, wages, or any terms or conditions of employment by reason of his membership in the Association and its affiliates, his participation in any activities of the Association and its affiliates, collective negotiations with the Board, or his institution of any grievance, complaint or proceeding under this Agreement or otherwise with respect to any terms or conditions of employment.

B. Statutory Savings Clause

Nothing contained herein shall be construed to deny or restrict to any teacher such rights as he may have under New Jersey School Laws or other applicable laws and regulations. The rights granted to teachers hereunder shall be deemed to be in addition to those provided elsewhere.

The joint agreement on forms for filing grievances is a standard procedure. However, there need be no agreement to jointly construct forms for the balance of items listed in E.4.

A "Sample Grievance Form" is contained in **Administering the Negotiated Agreement** at p. 200.

E.5. is a standard clause. It cannot be used, however, to deny an employee any rights he has under the "Sunshine Law" to compel a public discussion of his grievance. See **New Milford Board of Education,** PERC No. 81-36.

This is an example of an unnecessary commitment to a paraphrase of law. The PERC law provides: "Except as hereinafter provided, public employees shall have, and shall be protected in the excercise of, the right, freely and without fear of reprisal, to form, join and assist any employee organization or to refrain from any such activity." Note that the Sample Agreement language does not protect employees who don't join the NJEA, although the PERC law does.

School boards should also avoid the phrase beginning on the fourth line of paragraph A: *"and other concerted activities for mutual aid and protection."* This is not defined, but is an addition to the PERC law language, and could be used by the union to justify illegal job actions and strikes.

Note that paragraph A incorporates not only the PERC law, but also all "other laws of New Jersey or the Constitutions of New Jersey or the Constitutions of New Jersey and the United States!" Paragraph B. incorporates all "other applicable laws and regulations," meaning Federal statutes.

Boards should generally refrain from placing statutory provisions inlabor agreements. Certainly, your contract shouldn't incorporate by reference Federal statutes, nor the State and Federal constitutions. If

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references must be made to law, they should be **specific** references, not paraphrases. Furthermore, boards should think twice before agreeing to allow arbitrators to make determinations on the meaning of statutes. An arbitration clause that is limited to the "terms of this agreement" would probably permit an arbitrator to rule on alleged violations of statutes which are referenced in the agreement. **The arbitration clause can be as narrow as the parties make it.**

You can exclude disputes over statutory terms and conditions of employment from arbitration with language such as the following:

> *Alleged violations of statutes and regulations may be appealed before the Public Employment Relations Commission, the State Commissioner of Education, the State Board of Education, or other appropriate legal forums, and shall not be arbitrable under Article III of this agreement.*

If your contract presently has clauses such as A. and B., you should seek to negotiate them out of your contract or to negotiate exclusions of alleged violations of these provisions from arbitration.

C. Just Cause Provision

No teacher shall be discharged, disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage, or given an adverse evaluation of his professional services without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth.

Virtually all of paragraph C. involves matters which are either nonarbitrable or nonnegotiable with respect to **teaching staff members.** For example:

- The decision to non-renew a teacher for poor performance is not arbitrable. **Bethlehem,** PERC No. 80-5.
- The decision to non-renew a teacher due to a RIP is not arbitrable. **Maywood, 168 N.J. Super.** 45. (1979).
- Withholding of increments for teaching staff personnel cannot be grieved to binding arbitration. **Bernards Twp.,** 79 **N.J.** 311 (1979).
- Professional advantages, if referring to assignments, or to the availability of aides, is non-negotiable. **Rahway,** PERC No. 79-30; **North Bergen,** PERC No. 82-109.
- Transfers are not arbitrable. **Jefferson,** PERC No. 80-21.
- Adverse evaluations are not arbitrable. **Mahwah,** PERC No. 81-44.

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However, **discipline** of employees, including teaching staff members, is governed by **N.J.S.A.** 34:13A-5.3, which permits agreement to arbitrate disciplinary disputes, as long as the affected employee does not have an alternate statutory appeal procedure. PERC has held that a just cause clause, as it appears in the NJEA sample agreement, is illegal as it is not consistent with the Law's exclusion of certain grievances from arbitration. (**Hunterdon Central,** PERC No. 87-83.) PERC has also determined the types of discipline which, in accordance with the statute, can be submitted to arbitration.

PERC has ruled that the following types of discipline of **nonprofessional** employees are arbitrable:

- discharge of a bus driver. **Toms River,** PERC No. 83-148.
- suspension or discharge of nontenured custodians. **Willingboro,** PERC No. 83-147.
- Withholding of increments for custodians and secretary. **East Brunswick,** PERC No. 84-149, Aff'd, App. Dkt. No. 5569-83T6 3/14/85; certif. den., ____ **N.J.** ____ (1985).

In October 1986, PERC determined that certain letters of reprimand issued to **teaching staff members** may be arbitrated. Letters of reprimand which are designed to improve teaching performance are evaluative and may not be submitted to arbitration; however, letters of reprimand which contain sanctions or comments **not** designed to improve performance are disciplinary. In the absence of an alternate statutory procedure to appeal disciplinary letters of reprimand, this type of discipline affecting professional employees may be submitted to binding arbitration. **Holland Twp.,** PERC No. 87-43; **Union Beach,** PERC No. 87-44. Both recent decisions are currently on appeal. (For a complete update on relevant case-law, see p.12.)

To retain flexibility and to avoid arbitral review, Boards should avoid agreement to just cause clauses for all employees. Where these clauses are already part of a contract, Boards should ascertain that the provision is consistent with the Law.

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D. Required Meetings or Hearings

Whenever any teacher is required to appear before any administrator or supervisor, Board or any committee, member, representative or agent thereof concerning any matter which could adversely affect the continuation of that teacher in his office, position or employment or the salary or any increments pertaining thereto, then he shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have representative(s) of the Association present to advise him and represent him during such meeting or interview. Any suspension of a teacher pending charges shall be with pay.

An employee has a statutory right to representation in an investigatory meeting which he reasonably believes could result indiscipline. **North Warren Regional Board of Education,** PERC No. 79-9. Much of this clause is therefore unnecessary. But note that this right does not apply to evaulation conferences. Before agreeing to any clause such as this, boards should insist on knowing exactly what meetings the union has in mind.

The final sentence of D. is not clear. If the reference is to suspension prior to board review, payment would be appropriate. However, **N.J.S.A. 18A:6-14** provides, upon certification of any charge to the commissioner, that the board may suspend a teacher, with or **without pay,** pending determination of such charges within 120 days. Therefore, the final sentence of D. exceeds the statutory requirement and removes board discretion to withhold pay.

E. Evaluation of Students

The teacher shall maintain the exclusive right and responsibility to determine grades and other evaluations of students within the grading policies of the School District based upon his professional judgment of available criteria pertinent to any given subject area or activity to which he is responsible. No grade or evaluation shall be changed without approval of the teacher.

The **Ridgefield Park** decision renders this an illegal subject. But even prior to that decision, it seemed clear that the clause was a violation of law. In a decision by the Acting Commissioner of Education in July, 1977, the following appeared:

> *It is essential that local boards must retain such authority of review to prevent assignment of unreasonable or arbitrary grades. The acts of teachers may neither be insulated from administrative review of their supervisors and administrators nor from quasi-judicial review by the Commissioner or judicial review by the courts.* **Talarsky v. Edison Township Board of Education,** 1977 **S.L.D.** 862.

F. Criticism of Teachers

Any question or criticism by a supervisor, administrator, or board member of a teacher and his instructional methodology shall be made in confidence and not in the presence of students, parents, or other public gatherings.

G. Association Identification

No teacher shall be prevented from wearing pins or other identification of membership in the Association or its affiliates.

This section, if enforced in every case, probably would run counter to the Sunshine Law. Court decisions have determined that it is the individual employee who can select or reject public discussion of a personnel matter. The union cannot waive individual rights. If a teacher, for example, desires a discussion of his or her teaching performance to be held in public, the intent of this clause would have to be violated by the

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board as it complied with the Open Public Meetings Act.

Article V, *Association Rights and Privileges*

A. Information

The board agrees to furnish to the Association in response to reasonable requests from time to time all available information concerning the educational program and the financial resources of the district, including but not limited to: class size, number of specialists, annual financial reports and audits, register of certificated personnel, tentative budgetary requirements and allocations, agendas and minutes of all Board meetings, census data, individual and group teacher health insurance premiums and experience figures, names and addresses of all teachers, and such other information that shall assist the Association in developing intelligent, accurate, informed and constructive programs on behalf of the teachers and their students, together with information which may be necessary for the Association to process any grievance or complaint.

A. goes well beyond the legal requirements to provide information. First, the union's right to certain information will rest on an interpretation of Chapter 123. Therefore, there is no need for this clause in the contract. Second, the sample language guarantees that the board will supply data that has little or no relevance to collective negotiations. Particularly disturbing is the reference to "tentative budgetary requirements and allocations," whatever that means.

Unions generally have a right to information possessed by the employer which is **reasonably** needed to carry out the union's duty to negotiate on behalf of its members or to fairly process grievances. If you are presented with a demand which you believe goes beyond these standards, consult your board attorney or professional negotiator. (Also see, for example, **Union City**, PERC No. 83-162, where City's refusal to provide union with budgetary work sheets was not an unfair practice.)

The reference in the latter part of this clause to "developing intelligent, accurate, informed and constructive programs on behalf of the teachers and their students" is inappropriate in a labor contract and is probably an illegal topic of negotiations.

The balance of Article V grants certain rights to the union. You are under no legal obligation to grant any of these rights.

B. Released Time for Meetings

Whenever any representative of the Association or any teacher participates during working hours in negotiations, grievance proceedings, conferences, or meetings, he shall suffer no loss in pay.

B. could be agreed to if the "no loss of pay" provision covered employees **mutually scheduled** to participate in union activities.

C. Use of School Buildings

The Association and its representatives shall have the right to use school buildings at all reasonable hours for meetings. The principal of the building in question shall be notified in advance of the time and place of all such meetings. No approval shall be required.

C. in its "no approval" section could substantially interfere with the educational and/or extracurricular program in the district. It would be wiser to retain prior approval.

D. Use of School Equipment

The Association shall have the right to use school facilities and equipment, including typewriters, mimeographing machines, other duplicating equipment, calculating machines, and all types of audio-visual equipment at reasonable times, when such equipment is not otherwise in use. The Association shall pay for the

D. requires no advance approval. Is this acceptable to your administrators?

reasonable cost of all materials and supplies incident to such use, and for any repairs necessitated as a result thereof.

E. Bulletin Boards

The Association shall have, in each school building, the exclusive use of a bulletin board in each faculty lounge and teachers' dining room. The Association shall also be assigned adequate space on the bulletin board in the central office for Association notices. The location of the Association bulletin boards in each room shall be designated by the Association. Copies of all materials to be posted on such bulletin boards shall be given to the building principal, but no approval shall be required.

Some boards feel that it is inappropriate for the district to subsidize the union by providing district bulletin boards for union use, but consider it reasonable for the union to have exclusive use of those bulletin boards which it purchases and installs. Certainly the building principal should have the right to approve or disapprove those materials being posted on the central office bulletin boards. (Also see comments regarding exclusive rights at section L of this article.)

F. Mail Facilities and Mail Boxes

The Association shall have the right to use the inter-school mail facilities and school mail boxes as it deems necessary and without the approval of building principals or other members of the administration.

F. The United States Postal Service has ruled that it is a violation of the federal postal statutes for a board to permit a union to use a district inter-building mail service. This decision is presently being challenged by the NEA and other parties in federal district court. A board which has such a clause, or is willing to agree to one, should insist that the union agree to language indemnifying the district against any costs it might incur, including an order for retroactive payment of postage, related to its compliance with this clause.

G. Office Space

The Association shall be provided without cost to it, with adequate office space in a building at a location and of a description to be mutually agreed upon. The Association shall be allowed to install a telephone in such office at its own expense.

H. Leave for Association President

The Board shall grant up to full leave with pay to the president of the Association during his term in office according to a schedule submitted by the president prior to the beginning of each school year.

G., H. Most districts will find it impossible to comply with these demands.

I. Released Time for Faculty Representative

The Board shall provide up to ( ) hours per week of released time to a faculty representative designated by the Association in each building to perform his functions as Association representative in the enforcement of this Agreement. Said time shall be in addition to regularly scheduled preparation time and lunch period as provided in this Agreement.

I. In larger districts, leave is granted in limited amounts. Your circumstance should dictate whether a similar clause is acceptable.

J. Orientation Programs

All orientation programs for new teachers shall be co-sponsored by the Board and the Association with the Association obligated to assume only such costs as may be mutually agreed upon during the planning of such programs. To the extent prohibited by law, the Board shall not be expected to assume the cost of purely social events conducted as part of such orientation programs, nor shall the

J. makes the union an equal partner with the board and administration in orientation programs. The advisability of this depends on your district's relationship with its teachers' union.

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Association be expected to assume the cost of speakers, consultants, and services normally considered an appropriate professional in-service training activity of a board of education. Duties and responsibilities of teachers involving student supervision outside of regular class work shall be clearly explained as part of the regular orientation program.

K. Sub Contracting

The Board shall enter into no contract which will result in instruction being provided, supervised, or otherwise influenced by any person or persons, organization, group or company other than properly certificated persons directly employed by the Board or by the Association without the express written approval of the Association.

Subcontracting is an illegal topic of bargaining. **State of New Jersey, 88 N.J.** 393 (1982). A clause prohibiting subcontracting, or mandating negotiations prior to subcontracting, would be illegal and unenforceable. A board could, however, negotiate a clause providing for **discussions** with employee unions regarding a decision to subcontract, where the sole motivation for subcontracting is to save money. Procedural aspects of the decision to subcontract which affect terms and conditions of employment, such as reasonable notice of RIF due to the subcontracting, are negotiable.

L. Exclusive Rights

The rights and privileges of the Association and its representatives as set forth in this Agreement shall be granted only to the Association as the exclusive representative of the teachers, and to no other organizations.

Bear in mind that during the contract's "open period" (Sept. 1-Oct. 15 of the final 12 months), PERC has held that competing unions must be granted equal access to unit members. For further information, contact your solicitor or the NJSBA Labor Relations Department.

Article VI, *Teacher Work Year*

A. In-School Work Year

1. Ten (10) month personnel

The in-school work year for teachers employed on a ten month basis (other than new personnel who may be required to attend an additional ( ) days of orientation) shall not exceed ( ) days. The first day of the in-school work day shall commence no earlier than September , 19 , and the last day shall be no later than June , 19 .

2. Twelve (12) month personnel

a. The in-school work year of teachers employed on a twelve (12) month basis shall not exceed ( ) days.

b. Teachers on a twelve (12) month basis shall be entitled to ( ) vacation days, which shall occur between July 1 and August 31.

3. Definition of in-school work year

The in-school work year shall include days when pupils are in attendance, orientation days, and any other days on which teacher attendance is required.

4. Inclement weather

Teacher attendance shall not be required whenever student attendance is not required due to inclement weather.

The second sentence of A.1. attempts to establish the beginning and ending dates of the academic calendar. C.1. attempts to establish through negotiations the vacation breaks within the academic calendar. The **Burlington County College** Supreme Court decision, 64 **N.J.** 10 (1973), and recent PERC decisions hold that, while the actual number of days to be worked in a year is negotiable, the placement of those days is not.

Most boards have found that local unions have little desire to negotiate the calendar itself. Consultation with teachers is usually all that is needed, and is generally a good practice. But a clause requiring consultation **prior** to establishing or changing the calendar is not negotiable. **New Milford,** PERC No. 81-36.

B. Holidays

Teachers shall be entitled to the following holidays: (*denotes legal holiday)

*Labor Day
*Washington's Birthday

Teachers have a statutory right to leave with pay on legal holidays. Most districts do not close school on these

Rosh Hashanah
*Columbus Day
Yom Kippur
*Election Day
*Veterans' Day
*Martin Luther King Day
*Lincoln's Birthday
*Good Friday
*Memorial Day
*Independence Day
*Christmas Day
*New Years Day
*Thanksgiving Day

C. Vacation Periods

1. Teachers shall be entitled to the following vacation periods each year of the contract:

November __________ -November __________
December __________ -January __________
April __________ -April __________
Other __________ - __________

2. The work day prior to a vacation period shall be a half day (not to exceed four (4) hours).

days, however, in order to provide Christmas and spring vacation periods and an early June dismissal; the great majority of teachers cooperate by attending school on these days when so scheduled. (For a complete discussion of statutory holidays see **Negotiations 85.**)

D. Voluntary Work

The Board and/or the Administration may request voluntary work. However, any voluntary work performed on or during a holiday or vacation period shall be compensated at double the daily rate as determined by a 180-day work year. A teacher shall have the right to refuse to perform volunteer work during a holiday or vacation period.

This is a typical trade union proposal. Double time has never been agreed to by a school board for its professional staff.

Article VII, *Work Hours and Work Load*

A. Work Day

1. Teachers shall not be required to "clock in or clock out" by hours and minutes. Teachers shall indicate their presence for duty by placing a check mark in the appropriate column of the faculty "sign-in" roster.

A.1. Boards may desire more proof of presence than a check mark on a roster.

2. The arrival and departure times for all teachers shall be designated in Schedule C; however, their total in-school work day shall consist of not more than ( ) hours and ( ) minutes which shall include a duty-free lunch period as guaranteed to teachers under Section C of this ARTICLE.

A.2. While the length of the school day is a required subject of negotiations, you must be very careful to avoid limiting district operation. Districts which negotiate **total** hours of the work day, rather than the **actual times** employee attendance is required, have substantially more flexibility to meet changing conditions.

3. Except as clarified in paragraph 4 below, no teacher shall be required to report for duty earlier than ( ) minutes before the opening of the pupil's school day, and shall be permitted to leave ( ) minutes after the close of the pupil's school day, except as otherwise designated in Schedule C. On Fridays or on days preceding holidays, the teachers' day shall end at the close of the pupils' day.

A.3. In order to protect flexibility in assignment, it would be wise for a board to avoid specifying the actual arrival and dismissal time for teaching personnel.

4. Any teacher who is required to work beyond the regular teacher in-school work year as defined in ARTICLE VI, Section A.1, or beyond his/her total in-school work day as defined in paragraph 2 and 3 above, shall be compensated at the rate prescribed in ARTICLE VI, Section F.

A.4. should be refused on the grounds that, as professionals, teachers should perform reasonable amounts of work beyond the normal work day. Under the clause, an argument can be made that grading and preparation must be additionally compensated for. At the least, this clause would mandate extra pay for attendance at faculty meetings and after-school parent conferences.

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B. Workload

1. Junior and Senior High School

a. The daily workload in the junior and senior high school shall be ( ) students per day which shall be equitably distributed through ( ) teaching periods per day and shall not exceed ( ) hours per day.

b. Junior and Senior High School teachers shall not be required to teach more than ( ) subject area(s), nor more than a total of ( ) teaching preparations.

c. Regular classroom teachers in the junior and senior high schools shall not be required to change subject area teaching stations more than ( ) time(s) during the school day.

d. Secondary teachers shall not be required to teach continuously for more than periods, nor ( ) where double periods are used.

2. Elementary School

a. The daily workload in the elementary school shall be ( ) students per day and shall not exceed ( ) hours per day.

b. Regular classroom teachers in the elementary school shall not be required to change teaching stations.

c. Elementary teachers shall not be required to teach continuously for more than ( ) hours.

d. Grade level workload shall be equalized.

3. Specialists

The workload of each specialist shall be equalized and shall be determined by the following number of students per specialist:

a. Elementary Level	Options-Per Day/ Per Period/Per Wk.
Art Teachers	________
Vocal Music Teachers	________
Foreign Language Teachers	________
Physical Education Teachers	________
Guidance Counselors	________
Reading Specialists	________
Nurses	________
Instructional Media Specialists (Librarians)	________
Other	________

b. Secondary Level	Options-Per Day/ Per Period/Per Wk.
Guidance Counselors	________
Reading Specialist	________
Instructional Media Specialists (Librarians)	________

"Section F" apparently refers to Section D, above.

B.1.a. and B.2.a. are, in part, class size clauses; class size is an illegal topic of bargaining since the **Ridgefield Park** decision. PERC has further held that the effect upon workload of an increase in class size is not negotiable because it is "inescapably intertwined and inseparable from" the decision to increase class size. **N.J.I.T.**, PERC No. 80-27. By contrast, PERC has generally held that the number of assigned teaching periods and duty periods per day involves "work hours" and is a required topic for negotiations. **Buena Reg.**, PERC No. 79-63.

B.1.b., c., d., and B.2.b., c., and d. are illegal to the extent that the language would interfere with the district's ability to effectuate teaching assignments. However, PERC has held that the number of teaching preparations is a negotiable topic. (**Ramsey**, PERC No. 85-119.) In reviewing such workload provisions, PERC will look to the assignments' actual interference with the district's ability to implement its educational program. Although PERC may find such assignments nonnegotiable, it may find that the concurrent issue of compensation for increased workload to be severable and negotiable. Boards should avoid new agreements which can place limitations on their ability to assign staff.

B.3. is the equivalent of a class size clause and is probably illegal.

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Distributive Education __________
Nurses __________
Other __________

c. Specialists shall not be required to teach continuously for more than ( ) hours.

4. Reduction of Workload Exceptions

Any class based on the maximum per teacher limits stated in paragraphs 1, 2, and 3 above shall be reduced when the number of pupils assigned to any room is larger than:

a. The capacity of teaching facilities, number of adequate teaching stations and number of adequate pupil stations available in the room,

b. The appropriateness of the room to content of the course, the methods of instruction to be employed, and the prior preparation of teachers therefore,

c. The availability of equipment for adequate teacher demonstration and student use,

d. Any other conditions which affect the health, safety, and supervision of the pupils.

5. Overload

a. Where overload is necessary, teachers shall receive additional salary which shall be calculated by dividing the teacher's salary by the maximum class and multiplying by the number of overload students.

b. Any overload in excess of five (5) students shall be double the normal overload formula as determined above.

c. The determination of the actual workload shall be made on the third day of pupil attendance. Any overload shall be calculated and added to a teacher's salary immediately. Any additional overload thereafter shall be added to salary as of the date of the overload.

6. Lunch Periods

a. Grade Level and Other

Teachers shall have a daily duty-free lunch period of at least the following lengths:

1. Elementary School— __________
2. Junior High School— __________
3. Senior High School— __________
4. Other — __________

b. Leaving the Building

Teachers may leave the building without requesting permission during their scheduled duty-free lunch periods.

7. Preparation Time

a. Grade Level

Classroom teachers shall, in addition to their lunch period, have daily preparation time during which they shall not be assigned to any other duties as follows:

1. Elementary School— __________
2. Junior High School— __________
3. Senior High School— __________
4. Other members of the negotiating unit who are not regular classroom teachers shall be provided with preparation time to the same extent as other teachers.

b. Extra Pay and/or Released Time

1. It is desirable for each teacher to have an uninterrupted preparation period each day. The practice of using a regular teacher as a substitute, thereby depriving him/her of his/her preparation period, is undesirable and shall be discouraged. In those cases where regular substitutes are not available, regular teachers who volunteer may be used as substitutes during their non-teaching time.

Option (b)

1. Teachers may volunteer to perform the following nonteaching duties at the rate of $ per period.
a. Cafeteria duty
b. Supervision of playgrounds

B.4 is a class size provision and is illegal.

B.5 It is likely that PERC will find a clause such as this, which does not prohibit increases in class size but provides premium pay for teaching in such a class, to be legal. Few boards have agreed to such clauses.

The length of a duty-free lunch period is a mandatory subject for negotiations. PERC has held that a board's decision to require school nurses to remain on the school premises during lunch is non-negotiable as it involves student safety. **Salem City,** PERC No. 82-115.

B.6.b. Some boards may desire to require notice of a teacher leaving.

B.7.a. must be considered in light of the specific requirements and duties of each classification in the unit. Note that 7.a.4. would grant preparation time to nurses, librarians, and part-time employees covered by this contract. It may be unreasonable to provide these people with preparation time in light of their duties.

The second sentence of 7.b. is an illegal topic for negotiations, because it concerns the hiring process. **Elizabeth,** PERC No. 80-10. The rest of the clause is legal. Very few boards have agreed to pay extra money to **supervisory** duties, such as cafeteria, bus, or playground supervision, are **nonnegotiable (Ridgefield Park).**

PERC has ruled that the right to assign supervisory nonteaching

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In the absence of volunteers, a teacher may be assigned to serve as substitute. Volunteers and assigned teachers shall be paid at the rate of 1/1000 of their annual contract salary per class covered or the teacher may choose to credit these periods up to a total of ( ) periods which shall entitle him to ( ) additional personal business day(s) to be taken before the end of the current school year. Such coverage shall be arranged by the principal of the school in question and shall be distributed as equitably as possible among the teachers in said school.

2. In those cases where regular substitutes are not available and two classes are to be combined for the day or a major part thereof, the teacher in charge shall be paid 1/200 of his annual contract salary in addition to his regular salary; if the class is divided between two or more other teachers, each teacher teaching any part of the split class shall receive 1/400 of his/her annual salary in addition to his/her regular salary.

c. Exceptions

Exceptions to the provisions of Sections a and b above, may be made only in cases of extreme emergency. The Association shall be notified in each such instance, in advance, if possible.

d. Extra-curricular Activities

1. Approved Activites

The board and the Association agree that the extra-curricular activities listed in Schedule E.

2. Salary

Teacher participation in extra-curricular activities which extend beyond the regularly scheduled in-school day shall be voluntary, and shall be compensated according to the rate of pay and/or released time in Schedule E.

3. Staggered Schedule

In cases where released time is stipulated for extra-curricular assignments, such time shall be scheduled as a block at the beginning or end of the in-school day and attendance of the teacher at school shall not be required during said time.

e. Field Trips

Field trips shall be scheduled and implemented in a manner which shall be mutually agreed upon by teachers participating in them. Written permission for field trips shall be obtained from the superintendent to guarantee insurance coverage as a school-sponsored activity. For participation in field trips which extend beyond the teachers' in-school workday, and overnight or weekend trips, teachers shall be compensated at the rate set forth in Section A, paragraph 4 of this ARTICLE.

8. Meetings

a. Teachers may be required to remain after the end of the regular workday, without additional compensation, for the purpose of attending faculty or other professional meetings ( ) day(s) each month. Such meetings shall begin no later than ( ) minutes after the student dismissal time and shall run for no more than ( ) minutes. Except in cases of an emergency involving the health and safety of students and teachers, if additional time is needed, students shall be dismissed early.

b. Meetings which take place after the regular in-school workday and which require attendance shall not be called on Fridays or on any day immediately preceding any holiday, or other day upon which teacher attendance is not required at school.

teachers who must teach combined classes because of a lack of substitutes.

B.7.c. It is likely that any arbitration award involving this clause that prohibited an employer from acting in an emergency according to the employer's definition of "emergency" would be illegal.

This clause should conclude ". . . are educationally worthwhile." It should be rejected as illegal as it may prevent the board from determining new activities and terminating existing ones.

The decision to assign particular teachers to extracurricular positions, and the workload increase that necessarily accompanies that decision, is not negotiable. However, compensation for the assignment is negotiable. **Ramapo-Indian Hills,** PERC No. 80-9. While it is obviously preferable to have voluntary coverage of these activities, circumstances may not allow it for all activities.

B.7.e. The first sentence concerns an illegal topic for negotiations. See the commentary above.

B.8.a., b. and e. limit the district's ability to schedule after-school meetings for faculty. Before agreeing to such a clause, the board must be sure that the admistration finds it practical. The clause should be limited to faculty meetings so as not to limit the board's right to schedule parent-teacher meetings or to assign teachers to special assignments and programs presented by the students.

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c. An association representative may speak to the teachers during any meeting referred to in paragraph 1 above for at least ( ) minutes on the request of the representative.

d. The notice of and agenda for any meeting shall be given to the teachers involved at least ( ) days prior to the meeting, except in an emergency. Teachers shall have the opportunity to suggest items for the agenda.

e. Teachers may be required to attend no more than ( ) evening assignments or meetings each school year without additional compensation.

C. Department Heads

Department heads shall not be assigned more than ( ) student instruction-supervision periods each day, and shall be excused from regular study hall duties and homeroom assignments. A student instruction-supervision period means any period during which a teacher is responsible for directing the learning or supervising the behavior of students.

D. Instructional Planning

Every teacher shall plan and teach course content in the manner he considers most practical and useful. Teachers who have received satisfactory evaluations shall not be required to submit standardized daily or weekly lesson plans which involve a mandated procedure or form. Teachers shall provide substitutes with daily, weekly, and/or alternate plans as needed, according to procedures developed by the principal and the Liaison Committee in each building as hereafter established under ARTICLE XXII of this Agreement.

E. A teaching period shall be defined as any pupil contact situation.

F. Any violations of the above procedures which cause inconvenience, additional workload or impact on working conditions shall be remedied immediately.

Article VIII, *Nonteaching Duties*

A. Intent

The Board and Association acknowledge that a teacher's primary responsibility is to teach and that his energies should, to the extent possible, be utilized to this end. Therefore, they agree as follows:

B. Application

1. List of nonteaching duties

Option (a)

Personnel other than teachers shall perform nonteaching duties and teachers shall not be required to perform the following duties:

1. Nonprofessional assignments, including but not limited to milk distribution and supervision of cafeterias, sidewalks, bus loading or unloading or playgrounds.
2. Collecting money from students.
3. Inventorying and storing books, delivering books to classrooms, duplicating instructional and other materials, keeping registers and cumulative record cards, and other clerical and/or custodial functions.
4. Correcting standardized tests used at the direction of the Board or the Administration.

B.8.c. It is legally questionable, and impractical, for the union to have a right to speak at all meetings which teachers are required to attend.

C. Department heads who are truly supervisors within the meaning of the PEC law should not be included in the teachers' bargaining unit. See **PERC,** pp. 8-10 and "Determination of the Appropriate Supervisory Bargaining Unit" on p. 32.

D. The first and second sentences are illegal, and agreement to them would severely limit an administrator's ability to monitor the achievement of educational goals in a building and to evaluate the performance of staff. **Fairview,** PERC No. 81-19. The obligation to develop procedures for providing lessons for substitutes in consultation with the Liaison Committee is legal only as long as it doesn't interfere in the principal's access to the lesson plans or his ability to provide them to substitutes. (The Liaison Committee article is actually Article XVIII.)

F. The ambiguity of this clause is enough to warrant its rejection. The reference to "additional workload" may be illegal as it relates to increases in class size.

Paragraph A. of Article VIII is a goal statement and should not be agreed to.

PERC and the courts have held that assignments to certain nonteaching duties **not** related to student safety, security and control are negotiable. Therefore, duties such as moving furniture or supplies (**Byram,** 152 **N.J. Super.** 12, 1977) and collecting money for outside vendors of school pictures and insurance (**North Hunterdon,** PERC No. 85-100) are mandatorily negotiable. However, assignments to nonteaching

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c. Supervision of bus loading
d. Supervision of bus unloading
e. Milk distribution

Nonteaching Duties

2. Personnel other than teachers shall perform nonteaching duties and teachers shall not be required to perform the following duties.
a. Collecting money from students.
b. Inventorying and storing books, delivering books to classrooms, duplicating instructional and other materials, keeping registers and cumulative record cards, and other clerical and/or custodial functions.
c. Correcting standardized tests used at the direction of the Board or the Administration.

duties is not unlimited. Where such assignments result in increased workload or intrudes upon negotiated duty-free time, the effect of the assignment is generally mandatorily negotiable (**Mahwah,** PERC No. 83-96; **Hope,** PERC No. 83-126).

Boards should carefully review nonteaching proposals to assure negotiability. For example, in the Sample Agreement's language, Option (a) 1 is nonnegotiable while 2 is mandatory. A proposal for additional compensation for these duties, as appears in Option (b) would be legal. However, very few boards have agreed to additional compensation for such assignments which occur during the negotiated workday and which are part of teachers' contractual workload.

2. Secretarial assistance

By the beginning of the 19 - school year, the Board shall hire one (1) secretary for every ( ) teachers to assist teachers in the preparation of materials, correspondence, ordering supplies and other duties related exclusively to teachers.

The decision to hire secretaries, or any other personnel, is not negotiable.

3. Noneducational activities

Activities which have no educational objective shall be barred from the classroom. There shall be no collection of funds from students for:
a. Activities in which all pupils are expected to participate which should be legitimately financed by the Board.
b. Other activities of such a desirable educational nature that they should be legitimately financed by the Board.
c. Activities and charitable purposes not appropriate or directly related to the age and interests of the pupils.
d. Activities and charitable purposes beyond the ability to pay of the least able pupil in the classroom.

4. Transporting students

a. Teachers shall not be required to drive students. A teacher may do so voluntarily, however, with the advance approval of his principal or immediate supervisor. He shall be compensated at the rate of (¢) cents per mile for the use of his own automobile.

b. By the beginning of the 19 - school year, the Board shall cover all damages, losses, and expenses incurred by a teacher arising out of the authorized use of his automobile in the performance of school duties.

The decision as to whether funds will be collected from students, and what those funds will be used for, is not a legal topic for negotiations. Some of the restrictions in this clause may be sound educational/administrative policy, and may already be the practice in your district; they are not, however, suitable topics for labor contracts. Few, if any, boards have agreed to such a clause.

Article IX, *Teacher Employment*

A. Certification

1. Standard certificates

The Board agrees to hire fully certificated teachers holding standard certificates issued by the New Jersey State Board of Examiners for every teaching assignment.

Article IX brings the union into the hiring process. This area is considered, for good reason, a basic management prerogative.

In **Ridgefield Park,** the Court relied heavily on C.212, the T & E law, which very specifically lists hiring as a policymaking function to be carried out with a "maximum of citizen participation." As such, agreements which limit boards in setting criteria for hiring (within the framework of existing law) are illegal.

2. Notification

Upon employment the superintendent shall report to the Association in writing the certificates and degrees held, major and minor fields of study, and prior experience of each new teacher.

There is no valid reason why the superintendent should be required to "report" to the association the information demanded in paragraph A., clause 2 except as it is needed to ascertain whether the employee was placed on the proper salary level.

B. No Reduction

The Board agrees there shall be no reduction in the number of teachers from the previous year in positions defined in the unit represented by the Association as heretofore specified in ARTICLE I, Section A, of this Agreement for the duration of the Agreement.

(Notice to Association Leaders: If reduction in force is a threat in your district, the UniServ office will supply sample language for your contract.)

B. This is an illegal subject of negotiations.

C. Non-Certificated Personnel

The duties of non-certificated personnel shall be confined solely and exclusively to such duties as would assist certificated professional personnel in the performance of their respective duties. In no case shall any non-certificated employee be requested or required to perform any duty previously performed by a duly certificated professional employee.

C. The assignment of personnel, as long as it is carried out consistent with existing law, is major educational policy and, therefore, an illegal subject. The second sentence appears to refer to using employees outside of the bargaining unit (see Chapter 2, "Representation," in **PERC**) to do work, normally assigned to members of the unit. This is a required topic for negotiations. **Rutgers,** PERC No. 82-20, affirmed, App. Div., May 18, 1983 (unpublished).

D. Placement on Salary Schedule

1. Adjustment to salary schedule

Each teacher shall be placed on his proper step of the salary schedule as of the beginning of the 19 - school year in accordance with paragraph 2 below. Any teacher employed prior to February 1 of any school year shall be given full credit for one (1) year of service toward the next increment step for the following year.

2. Credit for experience

Credit up to the ( ) step of any salary level on the Teacher Salary Schedule shall be given for previous outside teaching experience in a duly accredited school upon initial employment in accordance with the provisions of Schedule A. Additional credit not to exceed ( ) years for military experience or alternative civilian service required by the Selective Service System and credit not to exceed ( ) years for Peace Corps, VISTA or National Teacher Corps work and time spent on a Fulbright Scholarship shall be given upon initial employment. As of the beginning of the 19 - school year, the aforementioned credit shall be given to any presently employed teacher who has not heretofore received it.

E. Returning to the District

A teacher with previous teaching experience in the School District shall upon returning to the system receive full credit on the salary schedule for all outside teaching experience, military experience or alternative civilian service required by the Selective Service System, Peace Corps, VISTA or National Teacher Training Corps work and time spent on a Fulbright Scholarship up to the maximum set forth in Section B above. Such teachers who have not been engaged in other teaching or the other activities indicated above shall, upon returning to the system, be restored to the next position on the salary schedule above that at which they left.

Although initial placement on the guide is a negotiable topic (**Belleville,** 209 **N.J. Super.** 93, 1986), paragraphs D.2. and E. should be rejected or modified, because they restrict your discretion in two serious ways. First, they **mandate** that you give credit on the salary schedule for certain types of experience. You may know that an applicant is very willing to work at a lesser salary, or that the prior experience is irrelevant to the position he or she is entering. For these reasons, a mandate to grant credit for the types of experience noted in D.2. and E. may force a board to expend money unnecessarily or unwisely, or lead it to reject a candidate because that person's "entitlement" under this clause would be much greater than other candidates.

Second, these clauses **limit** your ability to offer an employee a **higher** starting salary than is provided by this clause. Such a limitation puts a district at a disadvantage in relation to another district without such a clause.

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F. Previous Sick Leave Accumulation

Previously accumulated unused leave days shall be restored to all returning teachers.

G. Notification of Contract and Salary

Teachers shall be notified of their contract and salary status for the ensuing year no later than____________.

Article X, *Salaries*

A. Salary Schedule

The salary of each teacher covered by this Agreement is set forth in Schedule "A" which is attached hereto and made a part hereof.

B. Procedure for Withholding Increment

Regular salary guide increments excluding adjustment may be withheld in whole or in part for inefficiency or other just cause related to the performance of duties and only in accordance with the following:

1. Subject to ARTICLE IV, Section C.
2. That the procedures be adhered to as outlined in ARTICLE XVIII, "Teacher Evaluation."
3. The immediate superior and/or the principal shall not forward any recommendation to withhold a teacher's increment or a part thereof through the superintendent to the Board unless at least (90) ninety calendar days prior thereto, and in no case later than April 1 of the preceding school year in which such action would take effect, the principal has given to the teacher against whom the recommendations shall be made, written notice of the alleged cause(s) for the recommendations specifying the nature thereof with such particulars as to furnish the teacher an opportunity to correct and overcome the same.
4. Once a recommendation is forwarded to the teacher and the Board, the teacher may within ten (10) school days file a grievance commencing at the Superintendent level. No action shall be taken on the recommendation until the grievance is heard according to the grievance procedure as set forth heretofore in ARTICLE III of this Agreement.
5. Any action by the Board to withhold an increment or any part thereof shall be subject to appeal to arbitration as set forth in ARTICLE III of this Agreement. The arbitrator shall have the authority to restore all or part of the increment withheld retroactively.

It also severely restricts your ability to compete with the private sector for certain types of staff, particularly math and science teachers.

For these reasons, a board should insist on complete discretion in the initial placement of personnel on the salary schedule. The following language is recommended:

> *In accordance with* N.J.S.A. *18A:29-9, whenever a person shall accept employment as a teacher in this school district, his initial placement on the salary schedule shall be at such point as may be agree upon by the individual and the board of education.*

Note, however, that **N.J.S.A.** 18A:20-11 requires a board to give credit on the salary schedule for military service, to a maximum of four years. Credit for other types of service listed in this clause is not statutorily required.

Paragraph F.: There is no statutory compulsion that boards grant such a provision.

Agreement on any dates for contract notification should be made only after careful consultation with the superintendent. Early notification dates have caused difficulties in many districts.

Paragraph B. of this article restricts the board's authority to withhold a teacher's salary increment. In **Bernards Township,** the Supreme Court held such a restriction to be illegal (see "The Scope of Negotiations," earlier). The only aspects of withholding of an increment that may be negotiated are procedural matters that are consistent with **N.J.S.A.** 18A:29-14, such as notice to the teacher of the intent to withhold the increment, and the right to grieve the board's decision to **advisory arbitration.** (The article on teacher evaluation is actually ARTICLE XIV.)

6. Salary guide increment or part thereof withheld under this provision shall be restored the following year unless the procedures set forth in this provision are followed once again, in which case the increment or increments previously withheld and any additional increments which may be due may be withheld in whole or in part.

C. Method of Payment

1. Twelve (12) month
Each member employed on a twelve (12) month basis shall have the option of being paid in twenty-four semi-monthly installments or in twelve (12) monthly installments.

2. Ten (10) month
Each teacher employed on a ten (10) month basis shall have the option of being paid in twenty (20) equal semi-monthly installments, or ten (10) equal monthly installments.

3. Summer pay plan
Each teacher may individually elect to have ten (10%) percent of his monthly salary deducted from his pay. These funds shall be paid to the teacher or his estate on the final pay day in June, according to a schedule of payment throughout the summer as requested by the teacher, or upon death or termination of employment, if earlier.

4. Exceptions
When a pay day falls on or during a school holiday, vacation or week-end, teachers shall receive their pay checks on the last previous working day.

5. Final pay
Each teacher shall receive his final pay and the pay schedule for the following year on his last working day in June.

Agreements with respect to methods of payment must meet your own adminstrative needs and be consistent with legal requirements.

Article XI, *Teacher Work Stations*

A. Procedure

1. All teachers shall be given written notice of their salary schedules, class and/or subject stations, building and room stations for the forthcoming year not later than . A list of said schedules and stations shall be simultaneously sent to the Association.

2. The superintendent shall notify all newly-appointed personnel of their specific positions within that subject area and/or grade level for which the Board has appointed them. The Superintendent shall give notice of work stations to new teachers as soon as practicable, and except in cases of emergency, not later than

3. In the event that changes in such schedules, class and/or subject, building or room stations are proposed after , the Association and any teacher affected shall be notified promptly in writing and, upon the request of the teacher and the Association, the changes shall be promptly reviewed between the superintendent or his representative and the teacher affected and at his option a representative of the Association.

Notice provisions related to teacher assignment are required subjects for negotiations. Any aspect of this article, however, which infringes on the right of boards to make education-related decisions regarding assignments is illegal. Most of this article was subject to PERC analysis in **Fairview Board of Education,** PERC No. 80-18.

Paragraph A.1., 2., and 3. concern required topics for negotiations, because they are strictly procedural in nature. The dates on which notice can reasonable be given is a judgment for your district's administrators making these assignments.

B. Teachers shall only be assigned to teach in areas for which they hold a standard teaching certificate issued by the New Jersey State Board of Examiners.

This is an illegal topic because it concerns the criteria for assignment.

C. 1. Schedules of teachers who travel to more than one school shall be arranged so that no such teacher shall be required to engage in an unreasonable amount of inter-school travel. Such teachers shall be notified of any changes in their schedules as soon as practicable.

2. Teachers who may be required to use their own automobiles in the performance of their duties and/or teachers who are assigned to more than one (1) school per day shall be reimbursed for all such travel at the rate of ( ) cents per mile for all driving done between arrival at the first location at the beginning of their workday, provided, however, that if the distance from the teacher's home to his first location or from the teacher's last location to his home is greater than the distance between the teacher's home and his base school, he shall be reimbursed for the difference at the rate of ( ) cents per mile.

C.1. The first sentence of this clause is illegal because it imposes a limitation upon the board's ability to make up teacher schedules. The second sentence is procedural and negotiable.

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D. Procedure for Change in Teacher Work Stations

1. The superintendent shall deliver to the Association and post in all school buildings a list of the known vacancies as they occur.

2. Teachers who desire a change in grade and/or subject station or who desire to change to another building may file a written statement of such desire with the superintendent. Such statement shall include the grade and/or subject to which the teacher desires to be placed and the school or schools to which he/she desires to be placed, in order of preference. Such requests for change in the work station for the following year shall be submitted no later than

3. As soon as practicable, and no later than , the superintendent shall post in each school and deliver to the Association a system-wide schedule showing the names of all teachers whose work station has been changed, including the nature of the change.

D.1., 2., 3., and 6. are procedural and negotiable. If agreed to, be certain any dates included are adminstratively feasible.

4. In the determination of requests for a change in work station, the wishes of the individual teacher shall be honored to the extent that the change does not conflict with the instructional requirements and best interests of the school system. No such request shall be denied arbitrarily, capriciously, or without basis in fact. If a teacher's request for change has been denied, a renewed or subsequent request made in the following school year shall be granted under the conditions described above, unless there is no available position or an adequate replacement for the teacher cannot be obtained. If more than one teacher has applied for the same position, the determination as to which teacher shall receive it shall be made by lottery.

5. No vacancy shall be filled by means of involuntary change in work station if there is a qualified volunteer available to fill said position.

6. Notice of a voluntary change in work station will be given to teachers as soon as practicable, and except in cases of emergency not later than ________.

D.4. and 5. are illegal because they concern the criteria for selection and assignment of personnel.

7. When an involuntary change in work station is necessary, a teacher's area of competence, major or minor field of study, length of service in the School District, length of service in the particular school building, and other relevant factors including, among other things, state and/or federal laws, rules, regulations or administrative directives, shall be considered in determining which teacher is to be selected for a change in work station.

D.7 also concerns criteria for assignment and is illegal.

8. An involuntary change in work station shall be made only after a meeting between the teacher involved and the [insert appropriate title], at which time the teacher shall be notified of the reason therefor. In the event that a teacher objects to the change at this meeting, upon the request of the teacher, the superintendent shall meet with him. The teacher may, at his option, have Association representative(s) present at such meeting.

D.8. According to PERC, the right to a meeting to discuss a transfer prior to the scheduled date of the transfer is a procedural matter and is negotiable. However, "the existence of such a procedure cannot prohibit effectuation of an assignment until after such a meeting takes place." Failure to comply with a prior meeting clause may not authorize rescission of an assignment. **East Orange,** PERC No. 81-25. In other words, the clause is negotiable, but apparently unenforceable. Such clauses don't help either party. A better approach would be to place such a clause into administrative regulation and to exclude it from arbitration.

9. A list of open positions in the school district shall be made available to all teachers being involuntarily changed. Such teachers may request the work stations in order of preference, to which they desire to be changed. All such teachers shall be given adequate time off for the purpose of visiting schools at which open positions exist. Teachers being involuntarily changed from their present positions shall have preference over those seeking voluntary change in regard to choice among those

D.9. The first two sentences in this paragraph are procedural and negotiable, and may be acceptable to most boards. The third sentence is likewise negotiable, but may cause too many administrative problems

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positions which are vacant. A teacher being involuntarily changed shall be placed only in an equivalent position—i.e., one which among other things does not involve reduction in rank or in total compensation.

regarding the length and scheduling of such visits to be acceptable in your district.

The fourth sentence gives preference to involuntarily transferred teachers in filling vacancies. Such preference is illegal because it interferes in the assignment of personnel by management.

The last sentence is legal in some aspects, but at least potentially illegal in others. It is legal to the extent that it concerns matters that are themselves negotiable, e.g. protection against decreased compensation. It would be illegal if it were interpreted to concern non-negotiable matters; "equivalent position" cannot refer to class size, teaching assignment, or other such items.

10. Any teacher whose work station is changed shall be provided assistance in the following manner:

a. In cases of changes of work station during the work year, the teacher shall be provided one work week free of pupil contact in order to prepare for the new work station.

b. In cases of changes in work station determined during the summer vacation period, or changes scheduled during the work year effective for the next work year, the teacher shall have the option to work any one week during the summer vacation period. The teacher shall be compensated at the rate of pay appropriate to the new work year.

c. In the event a teacher takes courses related to the change in work station, the board shall pay the full cost of tuition and all related personal expenses.

PERC has held in **South River,** PERC No. 83-135, that the additional work of teachers transferring to the middle school (packing materials, orientation to the new school) involved an increase in work load and that compensation for this increase is arbitrable. D.10 appears to be negotiable only as it relates to paid leaves, extra compensation, and tuition reimbursement. 10a. and b., however, will be found by most boards to be unnecessary and therefore unacceptable.

Article XII, *Promotions*

A. Positions Included

Promotional positions are defined as follows:

Positions paying a salary differential and/or positions on the administrator-supervisory levels of responsibility including but not limited to positions as (list by title)

All vacancies in promotional positions, including specialists and/or special projects teachers, pupil personnel workers and positions funded by the federal government shall be adequately publicized by the superintendent in accordance with the following procedure:

1. Date of posting

When school is in session, a notice shall be posted in each school as far in advance as practicable, ordinarily at least thirty (30) school days before the final date when applications must be submitted and in no event less than fifteen (15) school days before such date. A copy of said notice shall be given to the Association at the time of posting. Teachers who desire to apply for such vacancies shall submit their applications in writing to the superintendent within the time limit specified in the notice, and the superintendent shall acknowledge promptly in writing the receipt of all such applications. Applications shall be kept on file in the superintendent's office for continual consideration for future vacancies until the office is notified in writing by an applicant that the application is withdrawn.

2. Application procedure

Teachers who desire to apply for a promotional position which may be filled during the summer period when school is not regularly in session shall submit their names to the superintendent, together with the position(s) for which they desire to apply,

If the board agrees to a notification procedure for promotions, the time limits agreed upon must be feasible.

The proposed definition of promotion should include reference not only to increased salary or salary differential, but should also make clear that extra work and/or extra pay assignments should not constitute promotions.

There appears to be no good reason to require the superintendent to acknowledge a request for a promotion; if, however, such acknowledgement must be made, it should be nothing more than a simple form reply.

The superintendent should not be required to maintain a continuous file nor be required to constantly review old applications until such applications are withdrawn. A new application should be required for each vacancy.

and an address where they can be reached during the summer. The superintendent shall notify such teachers of any vacancy in a position for which they desire to apply. Such notice shall be sent as far in advance as practicable, ordinarily at least twenty-one (21) days before the final date when applications must be submitted and in no event less than fourteen (14) days before such date. In addition, the superintendent shall, within the same time period, post a list of promotional positions to be filled during the summer period at the administration office, in each school, and a copy of said notice shall be given to the Association.

B. Criteria for Notice

In both situations set forth in Section A above, the qualifications for the position, its duties, and the rate of compensation, shall be clearly set forth. The qualifications set forth for a particular position shall not be changed when such future vacancies occur unless the Association has been notified in advance of such changes and the reason therefor. A disagreement over the necessity for such changes shall be subject to the grievance procedures set forth in this Agreement. No vacancy in a promotional position shall be filled other than in accordance with the above procedure.

C. Two Optional Plans (Select One)

Option (a)

All qualified teachers shall be given adequate opportunity to make application and no position shall be filled until all properly submitted applications have been considered. The Board agrees to give due consideration to the professional background and attainments of all applicants, and other relevant factors. In filling such vacancies, preference shall be given to qualified teachers already employed by the Board and when all other factors are substantially equal, length of time in the School District shall be the deciding factor. Each teacher applicant not selected shall, upon request, receive a written explanation from the superintendent. Appointments shall be posted in the schools or the giving of notification to the interested teachers. Announcements of appointments shall be made by posting a list in the office of the central administration and in each school building. The list shall be given to the Association and shall indicate which positions have been filled and by whom.

Option (b)

1. All qualified teachers shall be given adequate opportunity to make application for such positions and no positions shall be filled until all properly submitted applications have been considered. The Board agrees to give due weight to the professional background and attainments of all applicants and other relevant factors. In filling such vacancies, preference shall be given to qualified teachers already employed by the Board and when all other factors are substantially equal, length of time in the School District shall be the deciding factor.

2. All promotional positions shall be filled according to the following procedures:

a. Each applicant who meets the qualifications for a vacancy shall be interviewed by a committee of ( ) persons, ( ) appointed by the superintendent and ( ) appointed by the president of the Association, and a record of the interview shall be filed with the application. Interview ratings for each applicant shall be prepared independently by each member of the committee.

b. The committee shall then combine the independent interview ratings, together with the applicant's formal training, professional experience and experience in the School District into a total rating.

c. All applicants shall be placed on a ranked list according to their total ratings.

d. Selection for a vacancy shall be made from among the three (3) top ranking applicants by the superintendent with the approval of the interviewing committee.

3. Appointments shall be made not later than sixty (60) days after the notice is posted in the schools or the giving of notification to the interested teachers. Announcements of appointments shall be made by posting a list in the office of the central administration and in each school building, and a list shall be given to the Association indicating which positions have been filled and by whom.

It should be stated definitely and clearly that it is the function of the superintendent to determine the qualifications required for any promotion.

B. The third sentence is an illegal subject for negotiations, because it would interfere in the board's right to determine the qualifications for promotion. **Newark**, PERC No. 80-2.

C. In Option (a) the first sentence and sentences four through seven are procedural issues normally held by PERC to be required topics.

The second and third sentences go to the criteria for promotion and are thus illegal topics.

In Option (b), only the first sentence of the first paragraph and the last sentence of the last paragraph are procedural and negotiable. The rest of this article deals with the criteria for promotion and seriously restricts a board's discretion in this area.

For a detailed analysis by PERC on a similar clause, see **Newark**, PERC No. 80-2.

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Article XIII, *Accredited Evening High School—Summer School—Home Teaching and Federal Programs*

A. Posting

All openings for positions in the accredited evening high school, summer school, home teaching, federal projects, and other programs (including non-teaching positions for which teachers may be qualified and eligible) shall be publicized by the superintendent in accordance with the procedure for publicizing promotional vacancies set forth in ARTICLE XVI, Sections A and B of this Agreement. Summer school and accredited evening high school openings shall be publicized not later than the preceding March 1 and June 1 respectively and teachers shall be notified of the action taken not later than May 1 and September 1, respectively. Home teaching openings shall be posted as they occur.

The first question concerning this article is: are evening high school and summer school program personnel included in your bargaining unit? If they are not, there should be no negotiations over the terms and conditions of employment for those positions.

Even if certain positions are not included in the bargaining unit, requirements for notification of position openings is a required subject (no concessions must be made in this area). The dates contained in A. may be too early in some districts.

B. Criteria

In filling such positions, consideration shall be given to a teacher's area of competence, major and/or minor field of study, quality of teaching performance, attendance record, and length of service in the   School District. When all other factors are substantially equal, preference shall be given first to teachers who have taught the subject area and/or grade level in question during the regular school year and then to teachers who have taught the grade and/or subject in question on a regular basis at any time during the preceding   (   ) years. Teachers employed in the   School District shall have priority to such assignments before appointment to applicants from outside the district.

B. The criteria for selection of employees is not negotiable.

C. Salary

Salary schedules for positions included in this ARTICLE shall be negotiated under procedures outlined in ARTICLE II of this Agreement along with regular salary schedules wherever possible, or at such other times as may be appropriate in order to conform to the time requirements for the implementation of said programs.

D. Coverage by Master Agreement

All of the provisions of this Agreement shall apply to teachers holding positions in the accredited evening high school, summer school, home teaching and/or under federal programs, except where clearly inapplicable.

Again, C. and D. relate to terms and conditions of employment, but should not be a subject of negotiations unless these positions are included in the bargaining unit.

Article XIV, *Teacher Evaluation*

Two major decisions by PERC provide considerable guidance on the legality of the Sample Agreement language. These cases should be carefully reviewed before negotiating on this topic. **Bethlehem Board of Education,** PERC No. 80-5, and **Fairview Board of Education,** PERC No. 80-18.

Because of the State Board's rules on tenured teacher evaluation, there is a different range of negotiable items for tenured teachers as compared to non-tenured teachers. In either case, all educational policy matters, such as the criteria for evaluation and the selection of the evaluator, are non-negotiable. For tenured teachers there are substantial limits on the kinds of evaluation procedures that can be negotiated, because districts must conform to the extensive State

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Board regulations. The legal requirements for the evaluation of non-tenured teachers are less comprehensive, so there is more room for negotiations in this area.

Equally important to knowing the law on this topic is to know what is practical and effective in teacher evaluation. The opinions of your adminstrative staff are invaluable here.

A. Evaluation Committee

1. Membership

No later than September 15, 19 , the Board and the Association agree to establish an Evaluation Committee consisting of ( ) members, ( ) members appointed by the Board,and ( ) members appointed by the Association.

2. Responsibility

This Committee shall develop specific criteria for the evaluation of teachers.

3. Report Date

The recommendations shall be submitted for adoption to the Board and the Association no later than December 15, 19 .

Because the criteria for evaluation is an illegal subject, the creation of an employee committee that has anything more than advisory authority is non-negotiable. The committee should not be able to obstruct the board's ability to adopt or change evaluation criteria. While the board should encourage wide professional involvement in evaluation criteria development, that involvement may not exclude the public or individual teachers from having input.

B. Procedure

1. Frequency

a. Teachers shall be observed through classroom visitation by a certified supervisor at least ( ) times in each school year, to be followed in each instance by a written evaluation report and by a conference between the teacher and his immediate supervisor for the purpose of identifying any deficiencies, extending assistance for their correction and improving instructions. Each observation shall consist of at least a full period in the junior/senior high school or a complete lesson in the elementary school(s).

A requirement that a written report be provided when a classroom visit affects a formal evaluation is negotiable. However, a supervisor cannot be required to provide a written report **everytime** he/she visits the classroom. **Fair Lawn,** PERC No. 84-39. The minimum duration of an observation for a non-tenured teacher is set out in **N.J.A.C.** 6 3-1.19.

b. Teachers shall be informed of classroom visitation at least five (5) work days in advance of said visitation.

PERC has held advance notice of evaluations to directly affect the substantive aspects of the evaluation process and therefore to be illegal topics for negotiations.

c. Classroom visitations/observation shall not occur on the same day, nor shall any observation occur prior to the previous evaluation conference. In no case should any observation occur within ten (10) school days of the previous evaluation. All visitations/observations shall occur in the same work year.

B.1.c. This is procedural and negotiable.

2. Non-tenured Review

Violations of or disagreements over any of the provisions of this ARTICLE in cases involving nonrenewal of contract or termination of employment of nontenure teachers shall be subject to review under the Fair Dismissal Procedure established in ARTICLE XIX of this Agreement and shall be considered grounds for reinstatement without loss of pay or any other benefit provided by this Agreement.

B.2. PERC has ruled, in keeping with various court decisions, that the decision to renew or not renew a nontenured teacher is a non-negotiable management right. Hence this clause is illegal. (The Fair Dismissal Procedure is actualy found at ARTICLE XV of the Sample Agreement.)

3. Open Evaluation

All monitoring or observation of the work performance of a teacher shall be conducted openly and with full knowledge of the teacher. The use of eavesdropping, public address, cameras, audio systems, and similar surveillance devices shall be strictly prohibited.

B.3. is negotiable.

4. Evaluation by Certificated Supervisors

a. Teachers shall be evaluated only by persons certificated by the New Jersey State Board of Examiners to supervise instruction. By September 1 of each school year, each teacher shall be given the name of the person who will evaluate his/her classroom performance.

b. Evaluators shall be regular full-time employees of the school district and shall be certified in the instructional areas they are evaluating.

B.4.a. The first sentence limits the board in selecting its evaluators, and is illegal. The second sentence, providing that teachers be notified of their evaluator's name, is procedural and negotiable. B.4.b. is illegal because it restricts the board's right to hire and assign employees.

5. Copies of Evaluation

A teacher shall be given a copy of any class visit evaluation report prepared by his/her evaluator at least one (1) day before any conference to discuss it. No such report shall be submitted to the central office, placed in the teacher's file or otherwise acted upon without prior conference with the teacher. No teacher shall be required to sign a blank or incomplete evaluation form.

B.5. The first and third sentences are legally negotiable. The second sentence is negotaible for non-tenured teachers, and mandated for tenured teachers under the State Board regulations.

6. Conferences

Evaluation conferences as described in Section B.1 shall occur within fifteen (15) days of the observation. The conference shall be held within the school day without loss of benefit to the teacher.

B.6. is negotiable.

7. Right to Representation

A teacher shall have the right to representation in an evaluation conference.

B.7. is negotiable only if it is limited to those conferences where the individual teacher has reasonable cause to believe that the conference may result in discipline. ***Edison,*** PERC No. 83-100. Note that there is no right to such representation without a negotiated agreement so stating. A school board must consider the overall effect on the evaluation process of having a union representative present during an evaluation conference. Most administrators would find the presence of a union representative at an evaluation conference to be unnecessary and counterproductive.

8. Standardized Tests

Results of standardized tests used for evaluating students shall not be used to evaluate teacher performance.

B.8. is illegal as interference in the selection of evaluation criteria, and as contrary to the State Board regulations.

9. Communication

Prior to any evaluation report the immediate supervisor of a teacher shall have had appropriate communication, including but not limited to all steps in paragraph 10 below and the provisions of ARTICLE XXVIII, Section B of this Agreement with said teacher regarding his performance as a teacher.

B.9. is negotiable insofar as paragraph 10 is legal. The reference in the last two lines should be to ARTICLE XXV Section B. of the Sample Agreement, concerning an employee's right to counseling by his immediate superior.

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10. Reports

Evaluation reports shall be presented to each teacher in accordance with the following procedures:

a. Such reports shall be issued in the name of the evaluator. The evaluator is the person who observed the teaching performance as required in Section B. of this ARTICLE.

b. Such reports shall be addressed to the teacher.

B.10. concerns the content of the evaluation report and is for the most aprt preempted by the State Board rules as they apply to tenured teachers. Only B.10.b., mandating that reports be addressed to the teacher, is a negotiable addition to tenured teacher evaluation procedures.

c. Such reports shall be written in narrative form and shall include, when pertinent:

(1) Strengths of the teacher as evidenced during the period since the previous report.
(2) Areas of improvement needed by the teacher as evidenced during the period since the previous report. If these areas of improvement are not repeated in subsequent reports said areas shall be considered remedied.
(3) Specific suggestions as to measures which the teacher might take to improve his performance in each of the areas wherein weaknesses have been indicated.
(4) Upon request the evaluator shall demonstrate the proper method(s) to correct any areas of improvement.

B.10.c. outlines the specific contents of the evaluation report. PERC has specifically ruled that B.10.c.(4) is not negotiable because it "relates to the evaluation." Following this logic it appears that all of B.10.c. is non-negotiable for non-tenured employees because it involves the substantive content of the report rather than the procedures involved, and therefore limits managerial prerogatives.

11. Final Evaluation

The annual summary evaluation of a teacher shall be determined by a compilation of the required evaluations as provided in this ARTICLE.

B.11, according to PERC, is not negotiable because it concerns the content of the report.

C. Personnel Records

1. File

A teacher shall have the right, upon request, to review the contents of his personnel file and to receive copies at Board expense of any documents contained therein. A teacher shall be entitled to have representative(s) of the Association accompany him/her during such review. At least once every ( ) years, a teacher shall have the right to indicate those documents and/or other materials in his file which he/she believes to be obsolete or otherwise inappropriate to retain. Said documents shall be reviewed by the Superintendent or his designee and if, in fact, they are obsolete or otherwise inappropriate to retain, they shall be destroyed. Disputes over the retention of said documents may be processed through the grievance procedure, commencing at Level Two.

2. Derogatory Material

No material derogatory to a teacher's conduct, service, character or personality or any material which could have an adverse effect on a teacher's status shall be placed in his/her personnel file unless the teacher has had an opportunity to review the material. The teacher shall acknowledge that he/she has had the opportunity to review such material by affixing his signature to the copy to be filed with the express understanding that such signature in no way indicates agreement with the contents thereof. The teacher shall also have the right to submit a written answer to such material and his answer shall be reviewed by the Superintendent or his designee and attached to the file copy.

No Separate File

Although the Board agrees to protect the confidentially of personal references, academic credentials and other similar documents, it shall not establish any separate personnel file which is not available for the teacher's inspection.

Paragraph C., clause 1: To make disputes over whether or not materials included in the personnel file shall be expunged subject to the grievance process seems unwise. Since teachers generally have the ability to rebut materials contained in the file there seems little reason to become involved in controversy concerning expungement.

D. Termination of Employment

Final evaluation of a teacher upon termination of his/her employment shall be concluded prior to any recommendation for severance and no documents and/or other material shall be placed in his/her personnel file of such teacher after severance or otherwise than in accordance with the procedure set forth in this ARTICLE.

Paragraph D. was ruled non-negotiable by the Appellate Division in **East Brunswick** (unpublished opinion, May 3, 1982). The court stated, "An employer might well be greatly and quite legitimately

Article XV, *Fair Dismissal Procedure*

A. Fair Dismissal Committee

1. Membership

No later than September 15, 19 , the Board and the Association agree to establish a Fair Dismissal Committee consisting of ( ) members, ( ) members appointed by the Board and ( ) members appointed by the Association.

2. Responsibility

This Committee shall develop specific criteria which shall be used for nonrenewal of contract or termination of employment for nontenure teachers.

3. Report date

The recommended criteria shall be submitted for adoption to the Board and the Association no later than December 15, 19 , and shall become an addendum to this Agreement.

4. Distribution to nontenure teachers

The Board shall provide said criteria to all presently employed nontenure teachers, as soon as possible after adoption.

B. Notification of Status

1. Date

On or before April 30 of each year, the Board shall give to each nontenure teacher continuously employed since the preceding September 30 either:

a. A written offer of a contract for employment for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary and benefits as may be required by law or agreement between the Board and the Association, or

b. A written notice that such employment shall not be offered.

interested in matters concerning an employee after he leaves even though the matter may not be related to his employment." The reason: the employee may reapply in the future, and intervening events such as a criminal conviction would be of legitimate interest to the board in considering reemployment.

◆ In 1975, the Legislature enacted a statute and the State Board of Education enacted rules more specifically enforcing the rights of non-tenured teachers set forth in the **Donaldson** case.

These rules do not alter the basic relationship between a board and its non-tenured teachers. The nature of a non-tenured teachers' contract of employment with a school board is one for personal services with a commencement and a termination date. When the terminal date has been reached, the contract is discharged and there are no longer any rights, duties, or obligations chargeable to either party to the previous agreement. In short, no relationship binding a law exists between the parties, and so it has been held in several instances by the Courts of the State of New Jersey.

◆ A. A committee that is merely advisory to the board on this topic, and which neither binds the board nor obstructs its right to act in this area, is legally negotiable. **Commercial Township,** PERC No. 80-20. This is, however, the responsiblity of the administration and the board; such committees are rarely created through the negotiations process.

◆ A.4. is addressed in **N.J.A.C.** 6:3-1.19, the regulation governing evaluations of nontenured staff.

◆ B.1. is a restatement of law and is unnecessary. Be cautious of agreeing to early notification dates for tenured staff. In the event of a post-notification RIF, the board may be liable for payment dating back to the notification date (**Oldbridge 98 N.J. 523** (1985)).

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2. Reasons

Any nontenure teacher who receives a notice of nonemployment may within five (5) days thereafter, in writing, request a statement of reasons for such nonemployment from the superintendent, which statement shall be given to the teacher in writing within five (5) days after receipt of such request.

B.2. is an illegal modification of the statutory timelines found in **N.J.S.A.** 18A:27-3.2. The Appellate Division, in **East Brunswick** (see above), reversed PERC and found that the statue spoke in the imperative and did not permit modification through negotiations. Therefore, if you must have something in your contract on this issue, you should permit the employee up to **fifteen** (15) days to request a statement of reasons, and permit the board up to **thirty** (30) days to respond.

3. Hearing

Any nontenure teacher who has received such notice of nonemployment and statement of reasons shall be entitled to a hearing before the Board, provided a written request for hearing is received in the office of the secretary of the Board within five (5) days after receipt by the teacher of the statement of reasons.

B.3. The Administrative Code very specifically requires an **informal appearance,** not a hearing. It is not to be an adversary proceeding; it should be of reasonable length; the teacher may be represented by one person or counsel; witnesses may be presented with no cross-examination; appearances shall be in private. The code at **N.J.A.C.** 6:3-1.20(a) provides that the request must be submitted within ten (10) calendar days. The limitation to five (5) is probably illegal under **East Brunswick.**

4. Board determination

The Board shall issue its written determination as to the employment or nonemployment of said nontenure teacher for the next succeeding school year within five (5) days after the completion of the hearing. Said proceedings shall be completed and the Board's determination presented to the teacher no later than May 31.

B.4. The Administrative Code supporting the non-tenure evaluation law requires that the board's written determination be issued within **three** days of the informal appearance, not the five days listed in this clause.

Additionally, there is no requirement that a written decision issue prior to May 31st. Assume that notice not to reemploy was given on April 30th. The statement of reasons is requested on May 15th. The reasons are given on JUne 14th. On June 24th (the ten day period set forth in the Administrative Code), the affected teacher seeks an appearance which is held on July 14th, with a written determination issued on July 17th. Of course, most boards will proceed more quickly than this but if both parties exhausted each time limit, there would be no way to finish the process before mid-July.

5. Appeal to grievance procedure

If the teacher disagrees with the determination of the Board, he may submit the dispute through the grievance procedure as set forth in ARTICLE III of this Agreement, and said grievance shall commence at Level 3. In the event said grievance is submitted to arbitration, the arbitrator may restore the teacher to continued employment and may restore any loss of pay and/or benefits retroactively

B.5. As stated above, PERC has held that arbitrators have no authority to review a board's decision not to renew a non-tenured teacher. Arbitrators can hear grievances over

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to which the teacher would be entitled under the terms and conditions of employment required by law or this Agreement between the Board and the Association.

C. Failure to Comply

Should the Board fail to give a nontenure teacher either an offer of contract for employment for the next succeeding year or a notice that such employment shall not be offered and upon request by the teacher to the superintendent, a statement of reasons and a hearing, and in the event of such hearing shall fail to make and serve a copy of the determination, all within the time and in the manner provided by this ARTICLE, the Board shall be deemed to have offered to that teacher continued employment for the next succeeding school year upon the terms and conditions of employment as may be required by law or agreement between the Board and the Association.

D. Notification of Intention to Return

If the teacher desires to accept such employment, he shall notify the Board of such acceptance, in writing, on or before June 1, in which event such employment shall continue as provided for herein. In default of such notice the Board shall not be required to continue the employment of the teacher.

E. Termination of Employment

Any nontenure teacher who receives a notice that his employment shall be terminated shall be entitled to a statement of reasons and a hearing as provided for in paragraphs 2, 3, 4, and 5 of this Section except that a determination of the Board shall be made and served thirty (30) days before the expiration of the notice period provided for in said contract. Should the Board fail to comply therewith, then said notice of termination shall be invalid and of no force and effect and the employment of the teacher shall continue as if such notice had not been given.

Article XVI, *Complaint Procedure*

A. Procedural Requirement

Any complaints regarding a teacher made to any member of the administration by any parent, student, or other person which does or may influence evaluation of a teacher shall be processed according to the procedure outlined below.

B. Meeting with Principal or Immediate Superior

The principal or immediate superior shall meet with the teacher to apprise the teacher of the full nature of the complaint and they shall attempt to resolve the

procedural violations under this article, but, even if a procedural violation is found, the arbitrator is without any power to order reinstatement. **Fair Lawn,** App. Div., June 2, 1980, and **Fairview,** PERC No. 80-18.

C. attempts to expand the statutory right of teachers to **automatic reemployment** due to a procedural error by the board. The statutes provide that an employee is deemed to be offered an employment contract if the board fails to offer a contract or notice of non-renewal by April 30. This clause would provide such an automatic offer of a contract if the board missed **any** of the timelines in the article, i.e., the 30 day limit on providing a statement of reasons, the 30 day limit for scheduling the informal appearance and the three day limit for a written determination by the board following such an appearance. This is probably illegal. PERC has held that procedural violations in the evaluation process shall not be cause for reinstatment by an arbitrator; it follows that procedural errors in the appeal process also couldn't result in reinstatement.

D. is a restatment of law.

E. has stumped the entire Labor Relations Department. Any reader having information on the meaning or intent of this clause is invited to contact us as soon as possible. Prizes will not be given, but we'll publish winning entries. In the meantime, please don't put this into your contract.

The essence of this article deals with a complaint lodged against a teacher generally from an outside non-administrative source, for which the teacher grieves for relief and remedy against a potentially damaging influence which the complaint may have against the matter informally.

C. Right to Representation

The teacher shall have the right to be represented by the Association at any meetings or conferences regarding such complaint.

D. Procedure

Step 1.

In the event a complaint is unresolved to the satisfaction of all parties, the teacher may request a conference with the complainant to attempt to resolve the complaint. If the complaint is unresolved as a result of such conference, or if no mutually acceptable conference can be agreed on, the complaint shall move to Step 2.

Step 2.

Any complaint unresolved under Step One at the request of the teacher or the complainant shall be reviewed by the building principal or counterpart supervisor in an attempt to resolve the matter to the satisfaction of all parties concerned.

Step 3.

Any complaint unresolved at Step Two may be submitted in writing by the complainant or the teacher to the building principal or counterpart supervisor who shall forthwith forward a copy to the superintendent or his designee and the complainant.

Step 4.

Upon receipt of the written complaint the superintendent or his designee shall confer with all parties. The teacher shall have the right to be present at all meetings of the superintendent or his designee and the complainant.

Step 5.

If the superintendent or his designee is unable to resolve a complaint to the satisfaction of all parties concerned, at the request of the complainant or the teacher he shall forward the results of his investigation along with his recommendation, in writing, to the Board and a copy to all parties concerned.

Step 6.

After receipt of the findings and recommendations of the superintendent or his designee, and before action thereon, the Board shall afford the parties the opportunity to meet with the Board and show cause why the recommendations of the superintendent or his designee should not be followed. Copies of the action taken by the Board shall be forwarded to all parties.

Step 7.

Any complaint unresolved under Step 6. may be submitted by the teacher to the grievance procedure as set forth in ARTICLE III of this Agreement and shall commence at Level 3.

Article XVII, *Teacher Facilities*

A. Listing of Facilities

By the beginning of the 19 - school year, each school shall have the following facilities:

1. All rooms which are used for purposes of instruction during any portion of the months of May, June, July, August, September, and October shall be air conditioned;
2. Space for each teacher within each instructional area in which he teaches to store his instructional materials and supplies;
3. An air-conditioned teacher work area containing adequate equipment and supplies to aid in the preparation of instructional materials;
4. An appropriately furnished and air-conditioned room which shall be reserved for the exclusive use of teachers as a faculty lounge. Although teachers shall be expected to exercise reasonable care in maintaining the appearance and cleanliness of said lounge, it shall be regularly cleaned by the school's custodial staff.
5. A private pay telephone in each faculty lounge for the exclusive use of teachers;
6. A serviceable desk, chair, and filing cabinet for the exclusive use of each teacher;
7. A communication system so that teachers can communicate with the main building office from their classrooms;
8. Well-lighted and clean teacher rest rooms, separate for each sex and separate from the students' rest rooms;
9. A separate, private dining area for the exclusive use of the teachers;

teacher's evaluation report.

Very few boards have such a complaint procedure in their agreement.

It would appear that Paragraph A., B. and C. of this article should alone suffice to ensure fair and equitable treatment to any complaint so lodged against a teacher.

PERC has held that any complaint procedure that binds a third party, such as a parent or student, is non-negotiable. **North Plainfield,** PERC No. 83-120. It seems that Step 7, which permits the submission of the complaint to arbitration, would be illegal.

All of the items demanded in Paragraph A. must be examined in light of the existing facilities in the district to determine the extent of change or if, indeed, change is at all possible or necessary.

Most of items 1 through 11 were found by PERC to be required topics of negotiations. Items 12 through 15 were deemed illegal topics, as related to the means and methods of providing education to the students. PERC rejected the union argument that these were really "tools of the trade." **Byram,** PERC No. 76-27, aff'd in part, 152 **N.J. Super.** 12 (App. Div., 1977).

10. Free and adequate off-street paved parking facilities, which are protected against vandalism, properly maintained, and identified exclusively for teacher use;

11. Suitable, private closet space with lock and key for each teacher to store coats, overshoes, and personal articles;

12. Copies, exclusively for each teacher's use, of all texts used in each of the courses he is to teach;

13. Adequate chalkboard space in every classroom;

14. A complete and unabridged dictionary in every classroom;

15. Adequate books, paper, pencils, pens, chalk, erasers and other such material required in daily teaching responsibility.

B. Special Clothing

By the beginning of the 19 - school year, the Board shall provide gym uniforms for physical education teachers, smocks for art and home economics teachers, laboratory coats for laboratory science teachers, shop coats for vocational and industrial arts teachers. Proper laundering service for all of said items shall be provided without charge to the teacher.

Paragraph B. must be considered strictly as a cost item.

C. Work Room and Office

By the beginning of the 19 - school year, an appropriate room and other facilities for teachers who work in more than one school building shall be assigned to them in each school in which they work to permit the effective discharge of their responsibilities to their pupils. Such teachers shall also be assigned a single classroom or office for their exclusive use outside of regular teaching hours, with a desk or other equivalent facility and a place to store materials and supplies for their personal use.

Paragraph C. again presents a question concerning the allocation of space in specific schools. It must be examined by the board in light of maintenance of flexibility with respect to the utilization of space, now and in the future.

D. Answering Service

The Board agrees to provide an answering service between p.m. and a.m. for teachers to report unavailability for work. Once a teacher has reported unavailability, it shall be the responsibility of the administration to arrange for a substitute.

E. Vending Machines

Upon the request of the Association, vending machines shall be installed in the teachers' lounge and teachers' lunchroom areas. The proceeds from all such machines shall be placed in a student scholarship fund created for that purpose. Awarding of scholarships shall be administered jointly by the Association and the superintendent. The Teacher-Administration Liaison Committee in each building established according to the provisions of ARTICLE XXII of this Agreement shall develop mutually acceptable procedures for servicing said machines and accounting for the funds.

The Teacher-Administration Liaison Committee clause is actually found in ARTICLE XVIII.

F. Keys

In order to permit freedom of access both during and after regular school hours, all teachers shall be given keys to the faculty lounge, teacher work area, and interior hallway gates of their base school, and upon request, and subject to reasonable regulation, shall be provided with a key or other means of access to an outside door in their area of the building during nonschool hours.

Paragraph F. presents essentially a security problem with respect to the distribution of keys, and therefore, it must be so examined.

G. Student Transportation

By the beginning of the 19 - school year, the Board shall provide a vehicle and a driver for the transportation of individual students or small groups of students. Said vehicle and driver shall be used to transport sick students from school to home during the course of the school day.

This is not a term and condition of employment, since it relates to students and not to teachers.

Article XVIII, *Teacher-Administration Liaison*

A. Building Level Faculty Council

1. Organization

The Association shall select a Faculty Council for each school building which shall meet with the principal at least once a month during the school day for the duration

PERC has held that a Board-Teacher Liaison Committee proposal was a required topic for negotiations. This committee would have a majority of management representatives,

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of the school year. Said Council shall consist of not more than (1) member for every ( ) teachers in the school building, but shall in no event have less than ( ) members.

2. Areas for Faculty Council consideration

Areas for consideration by the Council shall include but not be limited to school building level decisions regarding:

a. Administration of this Agreement;
b. Facilitation of programs and recommendations of the Instructional Council hereafter established in ARTICLE XXIII of this Agreement;
c. Revision and development of building policies and practices.

B. Meetings with Superintendent

The Association's representatives shall meet with the superintendent at least once a month during the school year to review and discuss current school problems and practices and the administration of this Agreement.

Article XIX, *Instructional Council*

A. Organization

1. Purpose

An Instructional Council shall be established and shall meet not later than 19 . The purpose of the Council shall be to strengthen the education program through recommendations, research, implementation, and evaluation by the superintendent and the Association to best meet the needs of the students, the schools, and the community. The Council may consider, but not be limited to, advising the Board and the Association on such matters as curriculum improvements, teaching techniques, instructional organizational patterns, experimentation, extra curricular programs, in-service training and staff development, pupil testing and evaluation, philosophy and educational goals of the district, teacher recruitment, research, educational specifications for buildings, and other related matters regarding the effective operation of the School District.

2. Membership

The Council shall consist of ( ) representatives appointed by the superintendent and ( ) representatives appointed by the Association.

3. Committees

The Council shall be authorized to establish sub-committees or ad hoc committees for specific projects to allow for those who would be affected by Council recommendations to have an opportunity to be involved.

4. Individual initiative for suggestions

The Council shall encourage the initiation of ideas and suggestions for projects by individual teachers, departments, grade levels, Association committees, administrators, Board members, students, parents, or other interested parties.

5. Additional members

Nothing in this ARTICLE shall be interpreted to prevent the Council from consulting or appointing to its committees such additional teachers, administrators, professional advisors, students, parents, or other persons as the original members herein designated shall determine are desirable and appropriate for said purposes. In the event that professional consultants are added, the Board agrees to provide adequate funds to pay for each such service.

6. Rules of procedure

The Council shall establish its own rules of procedure and shall provide for a rotating chairman who shall be responsible for the arrangement and conduct of meetings.

7. Meetings

The Council shall meet at least once each month.

8. Information

The Council and its sub-committees shall be provided with the same access to

would engage in discussions, not negotiations, and would meet at the agreement of the parties. The clause specifically guaranteed that the existence of the committee would not preclude the board from exercising any of its legal rights. With these caveats, PERC ruled that such a liaison committee, even though it would discuss only non-negotiable matters, was itself a required topic for negotiations. **Commercial Twp.,** PERC No. 80-20.

It is likely, therefore, that the establishment of monthly meetings between the Faculty Council and the school administration to discuss non-negotiable matters is legally negotiable, as a non-binding forum for the expression of teacher concerns over non-negotiable matters.

It is not clear whether PERC's analysis regarding a Board-Teacher Liaison Committee will be applied to instructional Councils. The language in the Sample Agreement is much broader than that in the PERC case, and potentially much more restrictive.

Boards receiving this demand should consider establishing such a committee outside of the labor agreement, at the building and/or district level, for on-going consultation on non-negotiable matters.

Boards considering the establishment of such a committee, within or outside the contract, should avoid language which prevents administrative input and mandates open ended Board expenditures. For example:

- A.5. would permit the appointment of consultants, without specific Board approval, but would commit the Board to pay the concurrent costs.
- B.1. requires Association as well as Board action. While Board action may be necessary to adopt a new course of study or a new textbook, it is difficult to envision the need for Association action.
- C. requires a budgetary allocation which implicates the non-negotiable topic of budget formulation.
- D. appears to provide double pay: additional compensation and

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available school district information as provided to the Association as specified in ARTICLE V. Section A of this Agreement.

B. Reports

1. Board and Association action

The Board and the Association shall consider and study all written recommendations submitted by the Council for action. If the Board or the Association refuses to adopt any such recommendations, it shall state the specific reasons for such refusal in writing to the Council.

2. Minority reports

Reports of the Council or any sub-committee established by the Council may include minority as well as majority views.

C. Budget

As of September 1, 19 , the Board shall provide ($) dollars to the Instructional Council for the purpose of assisting said Council in establishing effective procedures for decision-making in implementing the responsibilities stated above in the School District.

D. Teacher Participation

1. Pay

Teachers who serve on the Instructional Council or any sub-committee organized by it beyond the regularly scheduled in-school day or in-school year shall be paid at the rate specified in ARTICLE VII, Section A, paragraph 4 of this Agreement.

2. Released time

In addition to whatever unassigned time they may be entitled to under the terms of this Agreement, teachers who are members of the Instructional Council or any of its sub-committees shall be provided with released time at the following rate for the purpose of working on any of the projects defined above:

a. Elementary Schools— ( ) periods per day
b. Junior High Schools— ( ) periods per day
c. Senior High School— ( ) periods per day
d. Other — ( ) periods per day

E. Clerical Assistance

Adequate secretarial and clerical assistance shall be provided for the Council.

Article XX, *Sick Leave*

A. Accumulative

As of September 1, 19 , all teachers employed shall be entitled to ( ) sick leave days each school year as of the first official day of said school year whether or not they report for duty on that day. Unused sick leave days shall be accumulated from year to year with no maximum limit.

B. Transfer from Other Districts

As of September 1, 19 , whenever the Board employs a teacher who has an unused accumulation of sick leave days from another school district in New Jersey, the Board shall grant additional sick leave credit in additional to the annual and accumulated sick leave provided in Section A of this ARTICLE as follows:

1. For the first year of employment in the School District a minimum of ( ) days or such lesser amount as may have been accumulated in the former district.

2. For each subsequent year of employment in the School District an additional ( ) days until all of the days accumulated in the former district have been credited.

3. The accumulation of sick leave days from another district shall be credited in accordance with the procedure outlined above after certification from the prior employing school district. The days of sick leave so credited may be used immediately or if not so used shall be accumulative for additional leave thereafter as may be needed.

4. The aforementioned sick leave credit shall be given to any presently employed teacher under the provisions described above.

release time. Boards should also consider the effect of release time on the district's educational program. As worded, the release time could be interpreted to be a daily guarantee, regardless of need.

- E., if it implicates the decision to hire additional staff, would be non-negotiable.

The amount of sick leave granted beyond ten days a year is purely a matter of economic ability and educational need. Any concession in this area should achieve an equivalent concession by the union.

B.3. The transfer of sick leave credit is not required by law and has been negotiated into very few contracts.

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C. Nonaccumulative

Nonaccumulative additional sick leave benefits shall be allowed to teachers according to the following schedule:

(Local Association option on type of additional nonaccumulative sick leave to be submitted.)

C. PERC, the State Board of Education, and the Appellate Division have all determined that automatic grants of sick leave beyond accumulated days are prohibited by **N.J.S.A.** 18A:30-6. See, for example, **Piscataway,** 152 **N.J. Super.** 235 (App. Div., 1977).

D. Summer School

As of September 1, 19 , teachers employed in the summer school program shall be granted ( ) nonaccumulative sick leave days.

Paragraph D. covers summer school jobs which are not in the bargaining unit. For this reason, this clause should be rejected.

E. Notification of Accumulation

Teachers shall be given a written accounting of accumulated sick leave days no later than September of each school year.

F. Retirement

Upon retirement, the retiring teacher shall be compensated for his or her accumulated sick leave at the rate of pay at the time of retirement.

See "Payment for Unused Sick Leave" at page 10 of **Negotiations 83** for a detailed discussion of this matter.

Article XXI, *Temporary Leaves of Absence*

See "Personal Leave," pages 7 to 9 of **Negotiations 83** for a detailed discussion of what should be contained and avoided in a personal leave clause.

A. Types of Leave

As of the beginning of the 19 - school year, teachers shall be entitled to the following temporary nonaccumulative leaves of absence with full pay each school year:

1. Personal

( ) days leave of absence for personal, legal, business, household or family matters which require absence during school hours. Application to the teacher's principal or other immediate superior for personal leave shall be made at least ( ) day(s) before taking such leave (except in the case of emergencies) and the applicant for such leave shall not be required to state the reason for taking such leave other than that he is taking it under this Section.

2. Religious

Up to ( ) days per school year for observance of religious holidays, where said observance prevents the teacher from working on said days.

A.2. PERC has held that contract clauses granting paid leave for religious holidays, which is not deducted from personal or vacation days equally available to non-religious employees, is unconstitutional. **Hunterdon Central High School Board of Education,** PERC No. 80-4, aff'd, 86 **N.J.** 43 (1981). Permitting employees to use general personal or vacation leave for religious observance, on the other hand, is legally negotiable. **Haddonfield,** PERC No. 82-106.

3. School visitation

Up to ( ) days for the purpose of visiting other schools or attending meetings or conferences of an educational nature.

4. Community service leave

Any teacher who is a member of a community service organization or who is requested by any such organization to attend or participate in meetings or programs of the organization conducted during school hours shall be granted time off with pay for such purpose upon request.

5. Conferences of affiliates

Up to ( ) days for ( ) representatives of the Association to

Paragraphs A.3. to A.9. must be analyzed locally regarding their cost and effect on administrative and educational efficiency. A.6. should, at the least, not include legal appearances where the board and teacher are adversaries, e.g. tenure hearings and PERC hearings.

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attend conferences and conventions of state and national affiliated organizations.

6. Legal

Time necessary for appearances in any legal proceeding connected with the teacher's employment or with the school system or in any other legal proceeding if the teacher is required by law to attend.

7. Death

Up to ( ) days at any one time in the event of death or serious illness of a teacher's spouse, child, son-in-law, daughter-in-law, parent, father-in-law, mother-in-law, brother, sister, brother-in-law, sister-in-law, and any other member of the immediate household. Teachers shall be granted up to ( ) days in the event of death of a teacher's friend or relative outside the teacher's immediate family as defined above. In the event of the death of a teacher or student in the School District, the principal or immediate superior of said teacher or student shall grant to an appropriate number of teachers sufficient time off to attend the funeral.

8. Summer school

Up to a total of ( ) days at the end of a school year and/or at the beginning of a school year, as may be required to attend summer school classes and/or to travel to the place where such classes are to be held.

9. Marriage and honeymoon

Up to ( ) days for the purpose of marriage and honeymoon or up to ( ) days for the purpose of attending the marriage of a member of the immediate family.

10. Temporary Military

Time necessary for persons called into temporary active duty of any unit of the U.S. Reserves or the State National Guard. A teacher shall be paid his regular pay in addition to any pay which he receives from the state or federal government.

11. Good cause

Other leaves of absence with pay may be granted by the Board for good reason.

B. In Addition to Sick Leave

Leaves taken pursuant to Section A above shall be in addition to any sick leave to which the teacher is entitled.

C. NJEA Convention

Each teacher who attends the NJEA Convention shall fully be compensated for all costs incurred for travel, tolls, meals and hotel.

◆ A.9. It should be possible for every teacher to schedule their marriage during winter, spring or summer vacations.

A.10. is covered by the law.

◆ A.11. can present serious difficulties especially to boards who have "past practice" or "savings clauses." The granting of additional leaves might establish an unwanted precedent. Unfortunately, a labor contract sometimes has the effect of limiting the ability of an employer to grant fringe benefits in excess of the contract simply because the employer's action to help employees in a given situation can force the employer to grant the same benefit in all similar cases.

◆ C. First, Chapter 123 prohibits an employer from assisting a union. The NJEA is a union. While no decision in this area has been issued, it is very possible that any agreement to this clause or any payment under it is a violation of law.

Practically, paragraph C. is unacceptable even if legal. There is no limit on any expense incurred. The cost to the board could be enormous if only a portion of teachers sought reimbursement of their expenses.

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Article XXIII, *Extended Leaves of Absences*

A. Association

The Board agrees that up to ( ) teachers designated by the Association shall, upon request, be granted a leave of absence without pay for up to ( ) year(s) for the purpose of engaging in activities of the Association or its affiliates.

B. International and Federal Programs

A leave of absence without pay of up to ( ) years shall be granted to any teacher who joins the Peace Corps, VISTA, National Teachers Corps, or serves as an exchange teacher or overseas teacher, and is a full-time participant in either of such programs, or accepts a Fullbright Scholarship.

C. Outside Teaching

A teacher on tenure shall be granted a leave of absence without pay for up to ( ) years to teach in an accredited college or university, private school or other public school district.

D. Military

Military leave without pay shall be granted to any teacher who is inducted or enlists in any branch of the armed forces of the United States for the period of said service and three (3) months thereafter, or three (3) months after recovery of any wound or sickness at time of discharge. A similar leave shall be granted to the spouse of any teacher who is so inducted or who enlists to join him for the period of special training in preparation for duty overseas in combat zones.

Maternity

1. Natural Birth

The Board shall grant maternity leave without pay to any teacher upon request subject to the following stipulations and limitations:

(a) Maternity leave shall commence and terminate, on the date requested by the teacher.

(b) Any teacher granted maternity leave without pay according to the provisions of this section may at her discretion elect to use all or any part of her accumulated sick leave during period of such absence and receive full pay and benefits for the same.

(c) Any teacher granted maternity leave shall at her request be restored to the exact same teaching position, subject area, and grade level vacated at the commencement of said leave.

(d) No teacher shall be required to leave work because of pregnancy at any specific time prior to expected childbirth nor be prevented from returning to work after childbirth solely on the ground that there has not been a time lapse of specific duration between childbirth and the desired date of return.

(e) The Board shall not remove any teacher from her duties during pregnancy unless the teacher cannot produce a certificate from her physician that she is medically able to continue teaching.

(f) The Board shall not discriminate against any person in violation of N.J.S.A. 10:5-1 et seq. the Law Against Discrimination, nor in violation of the Constitutions of the State of New Jersey and of the United States.

2. Any teacher who does not elect to take a maternity leave may continue to perform her duties as long as physically able to do so and will be entitled to return to her duties when her physician certifies that she is physically able to do so. The period of such absence will be deemed the same as for any other physical disability and she will be entitled to her annual and accumulated sick leave with pay during the period of absence.

The granting of any of the leaves in this area, other than sick leave, should be upon application to the superintendent for approval unless the board specifically provides otherwise. Such applications should provide sufficient notice for the superintendent to secure a substitute, or the related clause may be ruled invalid. **South River,** PERC No. 81-108.

A number of state and Federal laws govern military leave. Have your solicitor thoroughly review any proposed language.

This maternity leave clause has numerous problems. Paragraph 1.(a) is unacceptable because it ignores the negative impact upon the continuity of instruction that occurs when leaves begin and end during the school year.

At the least, **all maternity leaves should terminate at the beginning of a school year,** so that a substitute is not displaced in May or June. Some boards and unions have agreed that **maternity leaves will commence at the marking period nearest the onset of disability.** Others permit the leave to commence **following** the period of disability. Under such a clause, a pregnant teacher works until she is physically unable to do so; takes sick leave for the period of disability (generally, 30 days before and after the birth); and then begins her unpaid maternity leave.

Paragraph 1.(b) has been ruled illegal when applied to any period of time when the employee is not truly disabled. If any employee has accumulated 90 sick days, uses 35 of those days before and after the birth of her child, and then takes a maternity leave of absence for the purpose of raising the child, she is prohibited from utilizing her remaining sick days during this leave of absence. **Hackensack,** unpublished opinion (App. Div., March 9, 1982).

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3. Adoption

Any female teacher adopting an infant child shall receive similar leave which shall commence upon her receiving *de facto* custody of said infant, or earlier if necessary to fulfill the requirements for the adoption. No teacher on maternity leave shall, on the basis of said leave, be denied the opportunity to substitute in the School District in the area of her certification or competence.

F. Illness in Family

A leave of absence without pay of up to ( ) year(s) shall be granted for the purpose of caring for a sick member of the teacher's immediate family. Additional leave may be granted at the discretion of the Board.

G. Political

The Board shall grant a leave of absence without pay to any teacher to campaign for or serve in a public office, or to campaign for a candidate for a public office other than himself.

H. Good Cause

Other leaves of absence without pay may be granted by the Board for good reason.

I. Return from Leave

1. Salary

Upon return from leave granted pursuant to this ARTICLE, a teacher shall be considered as if he were actively employed by the Board during the leave and shall be placed on the salary schedule at the level he would have achieved if he had not been absent.

2. Benefits

All benefits to which a teacher was entitled at the time his leave of absence commenced, including unused accumulated sick leave and credits toward sabbatical eligibility, shall be restored to him upon his return, and he shall be assigned to the same position which he held at the time said leave commenced, if available or, if not, to a substantially equivalent position.

J. Extension and Renewals

All extensions or renewals of leaves shall be applied for and granted in writing.

Paragraph 1.(c) is illegal because it interferes in the board's right to assign staff.

Paragraphs 1.(d) and (e) are restatements of current case law. See **Castellano, 79 N.J.** 407 (1979).

Paragraph 1.(f) is the kind of sweeping restatement of law that shuld never be included in a negotiated agreement. See XX of this Analysis for a discussion of how to handle such clauses.

Paragraph 2 is also a restatement of law.

E.3. Adoption differs from pregnancy-related disability and sickness. It is akin to child-rearing leave. There is no obligation to agree to adoption leave. This clause is discriminatory in that it applies only to female teachers.

Any time the board agrees to the phrase "immediate family" in the contract, it should be sure to clearly define who is included in that relationship.

If a board is willing to agree to leaves for political purposes, it should limit the commencement date to the beginning of a school year, and the termination date to either the start of the first semester or marking period following the election, or to the beginning of the next school year.

H. presents the same potential problems as Article XXI.A.11, discussed on XX of this book.

I.1. There is no requirement that credit for teaching be given during periods of extended leave without pay. It is rarely done unless the teacher works for the district for over 90 days in the academic year of the leave.

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Article XXIV, *Sabbatical Leaves*

A. Purpose

A sabbatical leave shall be granted to a teacher by the Board for study, including study in another area of specialization, for travel, or for other reasons of value to the school system.

A. This language will result in teachers receiving paid sabbatical leaves to do nothing of value to the district, e.g., irrelevant travel, or study for a career outside of teaching. Boards should insist that the primary purpose of any sabbatical is to improve the teacher's value to the district upon return.

A number of boards have recently succeeded in deleting sabbatical leave clauses from their contracts.

B. Conditions

Sabbatical leave shall be granted, subject to the following conditions:

B. The word "shall" seems to remove any discretion from the board.

1. Percentage of teachers

If there are sufficient qualified applicants, sabbatical leaves shall be granted to a minimum of (%) percent of teachers at any one time.

B.1. By granting only a minimum, there is no way to predict the maximum number of teachers receiving sabbaticals. This is too open-ended for most boards. Besides, what will hapen if the minimum number of teachers don't apply?

2. Requests

Requests for sabbatical leave must be received by the superintendent in writing in such form as may be mutually agreed on by the Association and the superintedent, no later than January 1, and action must be taken on all such requests no later than February 1, of the school year preceding the school year for which the sabbatical leave is requested.

B.2. The January application date may be too late for proper budgeting by the board. The February date may not give the board enough time to evaluate the applications.

3. Minimum time to qualify

The teacher has completed at least seven (7) full school years of service in the School District.

4. Pay

A teacher on sabbatical leave (either for one-half (½) of a school year or for a full school year) shall be paid by the Board at (%) percent of the salary rate which he would have received if he had remained on active duty if said leave is for study and at (%) percent if for travel or other reason.

5. Return

Upon return from sabbatical leave, a teacher shall be placed on the salary schedule at the level which he would have achieved had he remained actively employed in the system during the period of his absence and he shall be credited with all other benefits for which he would have entitled during the period of his leave and continuing thereafter upon his return.

B.3., 4. and 5. are standard, except that most clauses don't permit sabbaticals for "travel or other reason" unless related to the teacher's responsibilities in the district. Most districts require that teachers who receive sabbatical leaves return to the district for one or two years following the sabbatical, or reimburse to the board the salary received during the sabbatical leave. See **Negotiations 80**, pp. 9-11, for more detail.

Article XXV, *Professional Development and Educational Improvement*

The question of the board agreeing to make certain payments in connection with this article is an appropriate subject for collective negotiations under the law.

A. Purpose

In our rapidly changing society teachers must constantly review curricular content, teaching methods and materials, educational philosophy and goals, social change and other topics related to education. The Board recognizes that it shares with its

There is no need for A. Moreover, the second and fourth sentences are probably illegal in light of **Ridgefield Park.**

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professional staff responsibility for the upgrading and updating of teacher performance and attitudes. The Board and the Association support the principle of continuing training of teachers and the improvement of instruction. The parties further agree that each teacher should fulfill the obligation for professional improvement in ways that best serve his own problems, functions, interests, and needs.

B. Assistance for Teachers

Within any one (1) week, a teacher who shall so request shall be granted at least thirty (30) minutes of counseling with his immediate superior. Such meetings shall be scheduled within the teacher work day and the teacher released from other duties therefor.

Paragraph B. provides for further reduction in the time a teacher might spend with students. Certainly such time can be found, without contract language, during preparation periods or, for elementary teachers, immediately after school. As professionals in other areas regularly expect to devote additional time to their profession beyond an eight hour day, so should teachers.

C. Programs

The Board agrees to implement the following at the beginning of the 19 - school year.

1. Pay and expenses for required training

To pay the full cost of tuition and other reasonable expenses incurred in connection with any courses, workshops, seminars, conferences, in-service training sessions, or other such sessions which a teacher is required and/or requested by the administration to take. Said teacher shall also be compensated for all time spent in actual attendance at said sessions beyond his regular working day and year at his regular rate as defined in ARTICLE VII, Section A, paragraph 4 of this Agreement.

2. Professional Development Committee for reimbursement

a. To establish a Professional Development Committee to act upon requests from teachers for authorization to attend courses, workshops, seminars, conferences, in-service training sessions or other such sessions. Within ( ) days after signing this Agreement, the superintendent and the president of the Association shall each appoint ( ) members to the Committee and they shall select a chairman from among themselves. The superintendent and the president of the Association may, from time to time, replace members appointed by them.

b. To pay the reasonable expenses (including fees, meals, lodging and/or transportation) incurred by teachers who attend such sessions with the approval of the Professional Development Committee.

If the committee under C.2. is entrusted with determinations of the value of various in-service and professional development courses or programs, this is probably an illegal subject.

3. In-service workshops, conferences, programs

a. The Board shall provide in-service professional improvement programs which shall be cooperatively planned in the instructional council to meet priorities jointly determined by the Association and the administration. In-service programs shall be conducted during the in-school teacher workday if teacher attendance is required. All programs conducted during the summer shall be voluntary and compensated at the rate set forth in ARTICLE VII, Section A, paragraph 4.

b. Teachers who participate in an in-service program shall be given credit for each program as provided in schedule D.

Ridgefield Park would seem to make the first sentence of C.3.a. an illegal topic, particularly if this is meant to prohibit the introduction of inservice topics which the administration, but not the union, deems appropriate. The balance of a. and all of b. relate to terms and conditions of employment.

4. Professional library

To expend up to ($) dollars per teacher each school year to purchase books, equipment and/or other educational resource materials, as may be recommended by the aforementioned Professional Development Committee for use by the professional staff for professional development and educational improvement. The Board shall provide adequate space for housing said books and materials in convenient and readily accessible locations.

C.4. is not a required topic of negotiations. C.4. through 8 are almost never contained in contracts.

5. Recruitment

To establish a Recruitment Committee to study and improve teacher recruitment. This Committee shall develop ways to utilize incumbent teachers who agree to be recruiters. The superintendent and the president of the Association shall each appoint ( ) members to this Committee and they shall choose a chairman from among themselves. Teachers who participate as members of this Committee shall suffer no loss of compensation and shall be reimbursed for any travel and expenses incurred in the performance of their functions.

C.5. This is not a term and condition of employment but is a major educational policy function and is, therefore, an illegal area.

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6. Summer program for professional development

To appropriate ($) dollars for a Voluntary Summer Program for Professional Development to afford teachers the opportunity to participate in activities which they propose and which shall contribute to the professional development of the participating teacher and to the educational advantage of the children served by the District. Participation in this program shall take place for a period of not more than one (1) month during July and/or August and participants shall be remunerated on a prorated basis, according to their monthly salary for the school year beginning July 1 of the summer employed.

a. Teachers may apply for this program no later than Applications shall be submitted to a Screening Committee consisting of ( ) members selected by the superintendent and ( ) members selected by the Association. The Committee shall receive, review, and approve or disapprove applications. All applicants shall be notified no later than May 1 of each year as to whether their applications have been approved.

b. The funds appropriated for this program shall be used to finance projects evaluated by the Screening Committee as fulfilling the objectives of the program.

c. The Screening Committee shall establish its own rules of procedure.

7. Innovative grants

To appropriate ($) dollars to establish a grant program to make funds available to teachers interested in designing and implementing innovative educational ideas and techniques.

a. The aim and purpose of this Section shall be to encourage creative and innovative teachers to experiment in order to better meet the educational needs of the students of the School District.

b. An Innovative Review Committee consisting of ( ) members appointed by the superintendent and ( ) members appointed by the Association shall be established no later than October 1, 19 Said Committee shall receive, review, and approve or disapprove applications for grants. Applications for grants shall be submitted no later than and awards shall be announced no later than

c. No individual grant under the terms of this Section shall exceed ($) dollars.

d. The Innovative Review Committee shall establish its own rules of procedure.

8. Experimentation

a. The Association and the Board have a mutual responsibility to promote better instruction. The Board welcomes Association participation in all aspects of strengthening the education program to best meet the needs of the students, the schools, and the community.

b. The Association may participate in any aspect of an experimental or other project or program. Such participation shall include, but not be limited to, all phases of proposals, inquiry, study, research, deliberations, recommendations, implementation, evaluation and adoption. Any aspect of an experimental program which would affect the terms and conditions of teacher employment shall be negotiated with the Association before implementation.

◄► C.8.a. is a general goal statement and should be rejected. It belongs in board policy, not in a labor contract.

With respect to any committee set up to review educational policy or programs, boards must be certain that input is not limited to the union. T & E requires broad participation by teaching staff members and, where appropriate, by the community. No contractual agreement should limit that participation.

Article XXVI, *Supervision of Student Teachers*

A. Mutual Responsibility

There is a continuing need for the recruitment of able teacher candidates and for the improvement of their preparation. Teachers enlisted to teach in any situation must be provided an education based on the best academic preparation supplemented with numerous planned experiences which can provide a working understanding of the students and classroom with which teachers must function effectively. Through the cooperation of the School District and the Association, the student teacher is provided with the setting to apply the professional knowledge and skills, theories, and philosophies which have been developed through college courses and related experiences. The Board and the Association accept the joint responsibility to prepare teachers and to provide student teachers with direct field experiences in the School District that are relevant to the teaching act.

◄► Consultation in the area of student teacher supervision seems desirable. Control of that program either by individual teachers or by the union does not. Almost no district in the State has negotiated on this topic.

The control over student teaching programs by the union through negotiated agreement is illegal. Certain provisions of this article do relate to teachers' terms and conditions of employment and are

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B. Procedures

The following procedures shall govern the supervision of student teachers:

1. Teaching experience

No teacher shall have a student teacher under his supervision unless said teacher has had at least three years of teaching experience, with the most recent year in his present position.

2. Voluntary participation

Supervision by a teacher of a student teacher shall be voluntary. Each teacher shall be polled prior to any school year for willingness to participate in the student teaching program, but this shall not be construed as acceptance of any particular student teaching assignment.

3. Academic record of student teachers

Prior to the assignment of student teachers, the superintendent shall request each prospective student teacher to provide prospective cooperating teachers a transcript of college courses and grades to date, statements relative to his academic proficiency from not fewer than ( ) of his college instructors, and a statement from his college assessing his potential strengths and weaknesses as exhibited in any previous field experiences or related training programs in classroom procedures or student relationships.

4. Consent

Each prospective cooperating teacher may accept or reject any student teacher. The teacher shall receive the request to take a student teacher at least ( ) weeks prior to the student's introduction to the classroom.

5. Released time

Each cooperating teacher shall be provided with released time with pay for attendance at regularly scheduled orientation and evaluation sessions sponsored by a student teacher's college or university.

6. Assignments

A cooperating teacher shall not involuntarily be given additional assignments outside of his regular responsibilities during the period he is supervising a student teacher.

7. Assuming responsibilities

The cooperating teacher and the student teacher shall assess the latter's readiness to assume teaching responsibilities and the cooperating teacher shall have authority for determining in what degrees those responsibilities shall be assumed.

8. Explanation of school personnel responsibilities

The superintendent, or his designee, shall arrange for other school personnel, including teachers, principal, remedial instructors, guidance counselors, curriculum coordinator, school psychologist, school nurse, and school social worker to assist the cooperating teacher in providing an understanding of their roles for the student teacher.

9. Materials and supplies

a. Upon request, a cooperating teacher shall be provided with a duplicate copy of all instructional materials and teacher manuals for use by the student teacher assigned.

b. Upon request a cooperating teacher shall be provided with those school records which he feels necessary for an understanding of the field experience by the student teacher. Upon completion of the field experience, the cooperating teacher shall arrange with the student teacher for the return of all such copies of student records.

10. Eligibility to teach

A student teacher shall be permitted to teach unsupervised only in areas for which he will be eligible for certification and only after the approval of the cooperating teacher.

11. Substitution

In accordance with State regulations, a student teacher can not be used as a substitute teacher.

12. Information for cooperating teachers

The superintendent or his designee, shall arrange for each cooperating teacher to be provided in writing with the following in accordance with college procedures:

a. Information about the student teacher, such as his background, college record, interests, talents, and special problems of which the cooperating teacher and school administrator should be aware.

b. Information about the college program and the college's expectations and requirements for student teachers.

c. Specific information about the date the student will begin the assign-

required subjects.

Under **Ridgefield Park,** it would appear that the following provisions are illegal: B.1., B.2., B.3., B.4., B.7., B.8., B.9.b., B.10., B.11., B.12.a. and b. and B.13. Those governing terms and conditions would seem to be: B.5., B.6., B.9.a. and B.12.c.

Some of the illegal matters are simply not terms and conditions of employment of the teacher (such as B.11., already covered by State law; it does not directly affect a teacher's working conditions). Others go to major educational policy-making (such as B.7.). Some of these may be sound administrative practice; they are not, however, appropriate topics for negotiations.

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ment, when he will complete the assignment, and holidays or special events which affect the student teacher's attendance.

13. Orientation

Prior to the commencement of the student teaching experience, the superintendent shall request that the prospective student teacher visit the School District for appropriate orientation by the superintendent or his designee and the cooperating teacher.

Article XXVII, *Protection of Teachers, Students and Property*

A. Unsafe and Hazardous Conditions

Teachers shall not be required to work under unsafe or hazardous conditions or to perform tasks which endanger their health, safety, or well-being.

Employee safety is a required topic for negotiations. A board must be very careful, however, to avoid vague language when making contractual commitments in this area. For example, the phrase "unsafe or hazardous conditions or to perform tasks which endanger health, safety or well-being" appears impossible to define precisely. Does the lack of air-conditioning endanger a teacher's well-being? The teacher may think so, and grievances arising from such a matter may result in arbitration awards that require the expenditure of vast sums of money.

On a proposal such as this, the union should be pressed to explain exactly what their specific concerns are. If these can be addressed through contract language, both parties may be satisfied to do so. If the union response is as vague as this clause, a board should not concede on this matter.

B. Procedure for Hazardous Conditions

When the Association makes a determination on a district-wide basis or a Faculty Council, as heretofore established in ARTICLE XXII, determines on a building basis that conditions are unsafe or hazardous for the health, safety, or well-being of students and teachers, the following conditions shall be established and exist until rescinded by the same body:

1. Meetings

In the event of any disorder or disruption in the regular school program, the Board, superintendent or affected building principals shall meet with the Association immediately on request of the Association to develop mutually acceptable programs to guarantee the safety of students, teachers, and property.

2. Association representatives

Representatives of the Association shall be allowed free access to buildings and teachers until conditions are no longer unsafe and hazardous.

B.1. This clause, to the extent it does not deal with **teacher's** safety and personal property, is non-negotiable. PERC has ruled that a public employer can refuse to meet or negotiate with employee representatives **during an emergency situation,** even though employees' terms and conditions were affected. **Camden,** PERC No. 80-3. The Faculty Council clause is actually found in ARTICLE XVIII.

3. Closings

The Association shall be consulted and be allowed to submit recommendations for consideration before any judgment is made to open or close school.

B.3. Other rulings, noted in the commentary accompanying ARTICLE XI, hold that the implementation of a management decision cannot be held up by a requirement to meet with employees or unions prior to the implementation. See **New Milford,** PERC No,. 81-36.

4. Unauthorized visitors

During said unsafe and hazardous period, persons not employed by the School District shall not be allowed into any school without the knowledge and permission of the senior faculty representative in a building. This shall apply to students visiting a school other than where they are assigned.

C. Reasonable Force

As specified in 18A:6-1. a teacher may, within the scope of his employment, use and apply such amount of force as is reasonable and necessary: To quell a disturbance threatening physical injury to others; to obtain possession of weapons or other dangerous objects upon the person or within the control of the pupil; for the purpose of self-defense; and for the protection of persons or property.

D. Action before Board or Commissioner

Whenever any action is brought against a teacher before the Board or before the Commissioner of Education of the State of New Jersey which may affect his employment or salary status, the Board of Education shall reimburse him for the cost of his defense if the action is dismissed or results in a final decision in favor of the teacher.

E. Assault

1. Legal assistance

The Board shall give full support including legal and other assistance for any assault upon the teacher while acting in the discharge of his duties.

2. Leave

When absence arises out of or from such assault or injury, the teacher shall be entitled to full salary and other benefits for the period of such absence but shall not forfeit any sick leave or personal leave.

3. Reimbursement for personal property damage

The Board shall reimburse teachers for the reasonable cost of any clothing or other personal property damaged or destroyed as a result of an assault suffered by a teacher while the teacher was acting in the discharge of his duties within the scope of his employment.

4. Medical

The Board shall reimburse a teacher for the cost of medical, surgical or hospital services incurred as the result of any injury sustained in the course of his employment.

5. Workmen's Compensation

Benefits derived under this or subsequent Agreements shall continue beyond the period of any Workmen's Compensation until the complete recovery of any teacher when absence arises out of or from assault or injury.

F. Reporting Assaults

1. Principal or immediate superior

Teachers shall immediately report cases of assault suffered by them in connection with their employment to their principal or other immediate superior.

2. Superintendent

Such notification shall be immediately forwarded to the superintendent who shall comply with any reasonable request from the teacher for information in the possession of the superintendent relating to the incident or the persons involved, and shall act in appropriate ways as liaison between the teacher, the police, and the courts.

G. Nurse

A school nurse shall be scheduled to be in each building for the entire school day as

B.4. This is an illegal delegation of managerial authority to a labor union.

Under **N.J.S.A.** 18A:16-6 and 16-6.1, teachers are statutorily entitled to indemnity against civil and certain criminal actions for any act or omission arising out of the performance of their duties. D appears to go much further and could be interpreted as a Board obligation to reimburse teachers' expenses in tenure charges which are dismissed or resolved in the teachers' favor. Boards should not agree to this type of provision.

E.1., 3. and 4. would be acceptable if they stipulated that such injury or legal proceeding was not determined to be the fault of the teacher. However, E.1. should define the very broad term of "other assistance."

E.2. and 5. seem to obligate a board to full salary and benefits. **For the life of the employee,** far too costly a debt for most boards to incur.

F.2. Access to confidential student records is not a term and condition of employment and, therefore, is an illegal topic.

Paragraph G. deals with a demand that requires the board to negotiate the scheduling of nurses. The board

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heretofore defined in ARTICLE VII. Section A of this Agreement.

Article XXVIII, *Maintenance of Classroom Control and Discipline*

A. Definition of Responsibilities

A definition of the duties and responsibilites of all administrators, coordinators, supervisors and other personnel pertaining to student behavior shall be reduced to writing by the superintendent and presented to each teacher at the start of each school year.

B. Special Assistance

When, in the judgment of a teacher, a student requires the attention of the principal, assistant principal, a counselor, psychologist, physician or other specialist, he shall so inform his principal or immediate superior. The principal or immediate superior shall arrange as soon as possible for a conference among himself, the teacher, and an appropriate specialist to discuss the problem and to decide upon appropriate steps for its resolution.

C. Disruptive Students

When, in the judgment of a teacher, a student is by his behavior seriously disrupting the instructional program to the detriment of other students, the teacher may exclude the student from the classroom and refer him to the principal. In such cases the principal shall arrange as soon as possible, and under normal circumstances not later than the conclusion of the following school day, a conference among himself, the teacher and possibly an appropriate specialist to discuss the problem and to decide upon appropriate steps for its resolution. If the teacher in question objects to the proposed readmission of said student to the classroom, the matter shall, within twenty-four (24) hours after the decision by the principal, be referred to an ad hoc committee consisting of two (2) members appointed by the principal, two (2) members appointed by the teacher and a fifth (5th) member, who shall act as chairman, appointed by the other four (4) members. Said committee shall consult with the teacher, the principal, and other appropriate professional and/or lay persons, including the student's parents and/or guardians, and shall render a final decision in the matter within ( ) days after the conclusion of such consultation.

D. Student Behavior Committee

As soon as possible after the execution of this Agreement, a joint Student Behavior Committee (consisting of ( ) members appointed by the superintendent and ( ) members appointed by the Association) shall be established to develop appropriate guidelines to be used by teachers in handling disruptive students and to develop constructive programs for disruptive students whose presence in regular classes represent unusual problems for the regular learning process. Recommendations shall be submitted to the Instructional Council established pursuant to ARTICLE XXIII of this Agreement.

E. Building Procedures

An appropriate student disciplinary procedure shall be developed for each school building by its Liaison Committee (established pursuant to ARTICLE XXII of this Agreement). Said procedure shall be submitted to the building faculty for approval prior to its implementation.

F. Expanded Involvement

Nothing in this ARTICLE pertaining to the development of guidelines and procedures by the Student Behavior Committee or each school's Liaison Committee shall be interpreted to prevent these committees from consulting or adding to their number such additional teachers, professional advisors, parents, students, or other

must insist that such a question is a matter for it to determine unilaterally. It represents a basic policy question and is not an item to be included in the terms and conditions of employment. **N.J.S.A.** 18A:40-1 **et seq.** prescribes the board's duties with respect to scheduling school nurses.

The board must retain the ultimate responsibility for the maintenance of control and discipline in the classroom. This is not an item that can be delegated to committees and it cannot be negotiated.

The board may want to arrange for the use of a committee to provide suggestions and advice on this topic.

The Liaison Committee article is actually ARTICLE XVIII; the instructional Council article is found at ARTICLE XIX.

Aspects of student discipline which relate to the formulation of educational philosophy is non-negotiable. **Jersey City Bd. of Ed.,** PERC No. 82-52. However, aspects of student discipline which affect terms and conditons without significantly interfering with the determination of policy (e.g., the right of a teacher to send a disruptive student to the principal's office) are negotiable.

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persons as the original members herein designated shall determine are desirable and appropriate for said purposes.

Article XXIX, *Insurance Protection*

A. Full Health-Care Coverage

As of the beginning of the 19 - school year, the Board shall provide the health-care insurance protection designated below. The Board shall pay the full premium for each teacher and in cases where appropriate for family-plan insurance coverage.

1. Provisions of coverage

Provisions of the health-care insurance program shall be detailed in master policies and contracts agreed upon by the Board and the Association and shall include:

a. Hospital room and board and miscellaneous costs
b. Out-patient benefits
c. Laboratory fees, diagnostic expenses, and therapy treatments
d. Maternity costs
e. Surgical costs
f. Major-medical coverage

2. Carrier(s)

The health insurance carrier(s) shall be for the basic hospitalization and medical-surgical coverage, and for the major-medical coverage.

3. Special program(s) and carrier(s)

In addition to the above stated program, provision shall be made to provide the following health programs:

a. Prescription drug costs
b. Dental care
c. Optical care

The Board shall make full payment for the services listed above in this paragraph with a carrier(s) approved by the Association.

4. Complete annual coverage

For each teacher who remains in the employ of the Board for the full school year, the Board shall make payment of insurance premiums to provide insurance coverage for the full twelve (12) month period commencing September 1st and ending August 31st. When necessary, payment of premiums in behalf of the teacher shall be made retroactively or prospectively to assure uninterrupted participation and coverage.

PERC has ruled that the choice of the insurance carrier is **not** a required topic for negotiations, as long as the level of benefits is substantially equivalent. **City of Newark,** PERC No. 82-5. However, as evidenced in a more recent decision involving the **Borough of Metuchen,** PERC No. 84-91, PERC will carefully scrutinize any unilateral change in carriers as to its effect on the level of benefits.

More and more boards are negotiating on the cost of a benefit, rather than the benefit itself. For example, a board may agree to pay $50 per employee toward a prescription drug insurance plan; employees pay the rest of the insurance premium. This approach has numerous benefits:

- it prevents the board's automatic assumption of increases in insurance costs;
- it makes employees aware that such benefits are substantial cost items;
- it may make the union interested in dropping a demand for a new insurance benefit;
- and, if the board agrees insubsequent negotiations to increase its share of the premium cost, it does so as a concession to the union, in exchange for which a concession should be obtained from the union.

B. Retirement Coverage

The Board shall provide for continuance of health-care insurance after retirement on the terms detailed in the master policies and contracts agreed upon by the Board and the Association.

C. Description to Teachers

The Board shall provide to each teacher a description of the health-care insurance coverage provided under this ARTICLE, no later than the beginning of the 19 - school year, which shall include a clear description of conditions and limits of coverage as listed above.

Continuation of health-care coverage for retiring employees is a new, and popular, union proposal. Boards should keep in mind that a new Federal Law (COBRA) requires local boards to provide continuation of coverge to employees facing certain situations, including retirement. For a full discussion of COBRA see the update article on p.14. Boards who are participating in the State Health Benefit Program should consult with their attorneys, the Division of Pensions or the Labor Relations Department to fully understand the implications of agreement to this provision under the rules of the SHBP.

D. Washington National Meetings

The superintendent shall permit representatives of the NJEA Washington National

If it is agreed that Washington National representatives may conduct

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Income Protection Plan to meet with teachers for the purpose of enrolling new members and permitting present members to adjust their coverages at faculty meetings on a district or building level at the request of the Association. Requests for such meetings shall be made no more than once a year. It is agreed that the Washington National representative shall be permitted a minimum of twenty (20) minutes for the meeting.

meetings in the school, such meetings should not constitute one of the meetings provided elsewhere in the contract. There is no reason why it should constitute a "faculty meeting." Because Washington National is, in effect, a subsidiary of NEA, it is advisable to allow meetings only outside of the school day. Certainly teachers should not be compensated for their voluntary attendance at this meeting.

Article XXX, *Personal and Academic Freedom*

A. Personal

The personal life of a teacher is not an appropriate concern or attention of the Board except as it may directly prevent the teacher from performing properly his assigned functions during the workday.

B. Citizenship

Teachers shall be entitled to full rights of citizenship, and no religious or political activities of any teacher or the lack thereof shall be grounds for any discipline or discrimination with respect to the professional employment of such teacher, providing said activities do not violate any local, state or federal law.

C. Academic

The Board and the Association agree that academic freedom is essential to the fulfillment of the purposes of the School District, and they acknowledge the fundamental need to protect teachers from any censorship or restraint which might interfere with their obligation to pursue truth in the performance of their teaching functions. Accordingly, they agree as follows:

While it should not be the board's intention to in any way deprive a teacher of any of the rights that an individual, or an individual in the capacity of a teacher, is provided as a matter of law, this type of clause in the contract would be an inappropriate matter for the purpose of collective negotiations.

It should be noted, however, that the provision of this demand contained in paragraph A, which states that the personal life of a teacher is not an appropriate concern of the board, is not a sufficiently clear statement. The board must have a definite interest in the personal life of a teacher as it might bear upon his or her suitability for teaching in the district.

1. Controversial material

Teachers shall be guaranteed full freedom in classroom presentations and discussions and may introduce politically, religiously or otherwise controversial material, provided only that said material is relevant to the course content.

2. Personal opinion

In performing their teaching functions, teachers shall be guaranteed full freedom in expressing their personal opinions on all matters relevant to the course content, provided, however, that when they do so they shall make every effort to indicate that they are speaking personally and not on behalf of the school, its administration, or the Board.

3. Censorship

Teachers shall not be censored or restrained in the performance of their teaching functions on the ground that the material discussed and/or opinions expressed are distasteful or embarrassing to those in authority in the school system or detrimental to school or school system public relations.

C.1. has been ruled to be a non-negotiable topic. **New Milford,** PERC No. 81-36. PERC did not address the constitutional questions that were raised. It is clear, however, that the constitutional freedoms of public employees can and have been protected outside the confines of the negotiated agreement. In **Rutgers,** PERC No. 84-44, PERC reiterated that academic freedom is a non-negotiable matter of fundamental educational policy.

In June, 1978, PERC ruled that teachers had no right to use students as messengers for union notices to parents. The decision would seem to apply to classroom discussion of the district labor disputes which are initiated by the teacher.

Article XXXI, *Books and Other Instructional Materials and Supplies*

A. Purpose

The Board shall allocate sufficient funds to provide for the purchase and/or replacement of textbooks, library books, instructional materials, supplies and

A. Procedures for reimbursement for purchase of equipment and supplies are negotiable. But the decision as to how much money to make available for equipment of sufficient quality and quantity to enable teachers to properly fulfill their teaching responsibilities. Specifically, the Board agrees that during the 19 - school year it shall provide the following allocations:

1. Per pupil costs

Funds for instructional materials and supplies shall be increased by not less than ($) dollar(s) per pupil for kindergarten through sixth grade and by not less than ($) dollar(s) per pupil for seventh grade through twelfth grade. Teachers purchasing materials and/or supplies with the advance approval of their principal or immediate superior shall be reimbursed upon submission of an appropriate receipt of purchase.

2. Home instruction

($) dollars per home instructor shall be used to purchase additional materials and supplies necessary in carrying out the instructional program. Such teachers shall be reimbursed up to said amount upon submission of an appropriate receipt of purchase.

3. Petty cash

A Petty Cash Fund shall be established in each building for use in purchasing incidental supplies for classroom instructional use. Expenditures from this fund shall be at the discretion of the teacher. The teacher shall be reimbursed upon presentation of a paid receipt for such expenditures to the principal, up to the following maximums.

a. Secondary schools— ($) dollars per teacher per month

b. Elementary schools— ($) dollars per teacher per month

B. Review and Evaluation of Books and Materials

1. Procedure

An improved procedure for reviewing and evaluating books and other instructional materials and supplies shall be instituted as soon as possible after the effective date of this Agreement. Said procedure shall provide, among other things, for the following:

a. A separate committee shall be established to make recommendations for each subject area;
b. School-based teachers shall constitute a majority of each such committee;
c. A subject supervisor shall not be able to override the recommendations of such committee;
d. The recommendations of each such committee shall be published and distributed to all schools; and
e. The distinction between books adopted for system-wide use and those for which there is freedom for individual school and/or teacher choice shall clearly be defined.

2. Textbook Policy Committee

A Textbook Policy Committee (consisting of ( ) members appointed by the superintendent and ( ) members appointed by the Association) shall be established as soon as practicable to work out the mechanics of the aforesaid procedure so that it may be implemented by the beginning of the 19 - school year.

3. Pay and/or released time

Teachers serving on committees organized pursuant to this ARTICLE shall be provided with scheduled released time for this purpose and/or paid at the rate specified in ARTICLE VII, Section A, paragraph 4 of this Agreement, for time spent in excess of the regularly scheduled in-school work year or workday.

C. Standards for Materials

1. Criteria

Instructional materials used in the School District shall reflect the multi-ethnic nature of our society and shall evidence a sensitivity to prejudice, to stereotypes, and to materials offensive to minority groups, as measured by the following criteria:

a. The suggestion, by omission or commission or by over- or under-emphasis that any racial, religious, or ethnic segment of the population is more or less capable or more or less important than any other in the mainstream of American life is to be avoided.

b. Opportunities for full, fair, accurate, and balanced treatment of minor-

reimbursement, and what materials are needed to enable teachers to fulfill their responsibilities, is not negotiable.

B. It is not clear if PERC's ruling regarding Board-Teacher Liaison Committees will extend to such things as textbook selection committees. Certainly, B.1.c. is illegal; such committees cannot interfere whatsoever with management prerogatives.

C.1. The criteria for textbook selection listed here may be excellent but, because this clause does not relate to a term and condition of employment, it is a prohibited subject for negotiations.

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ity groups should be utilized.

c. Recognition of minority groups by frequent placement in positions of leadership and centrality is necessary.

d. Both male and female members of minority groups should be depicted in situations which exhibit them as worthy examples of mature American citizens.

e. Attention should be given to the presentation of fully integrated human groupings and settings indicating equal status.

f. The group representation of individuals should be clearly apparent and the exclusive utilization of Caucasian facial features avoided in such representation where appropriate.

g. Broad-ranging, well-planned, and comprehensive materials which represent the contribution and achievements of minority groups in art, science, history, literature, and all other aspects of life and culture should be apparent in the design of materials.

h. Life in contemporary urban environments, as well as rural and suburban environments, should be pictured.

2. Materials Center

A materials center shall be maintained and charged with the responsibility of seeking multi-ethnic materials related to study units being taught. The center shall also develop and maintain a current list of resource centers and persons within and outside the community.

D. Testing

Achievement tests which are to be used by the School District for district, school, subject, or grade-wide purposes shall be approved in advance by the Instructional Council as heretofore established in ARTICLE XXIII of this Agreement. The Instructional Council shall consider the kind and type of test, the use to which a test is to be put, and the dissemination of the test results and any interpretation of those results.

D. This is an illegal subject.

Article XXXII, *Deduction from Salary*

A. is basically a restatement of law.

A. Association Payroll Dues Deduction

1. The Board agrees to deduct from the salaries of its teachers dues for the Association, the County Education Association, the New Jersey Education Association or the National Education Association, as said teachers individually and voluntarily authorize the Board to deduct. Such deductions shall be made in compliance with Chapter 233 N.J. Public Laws of 1969 (NJSA 52:14-15.9e) and under rules established by the State Department of Education. Said monies together with current records of any corrections shall be transmitted to such person as may from time to time be designated by the Association by the 15th of each month following the monthly pay period in which deductions were made. The person designated shall disburse such monies to the appropriate association or associations.

2. Each of the associations named above shall certify to the Board, in writing, the current rate of its membership dues. Any association which shall change the rate of its membership dues shall give the Board written notice prior to the effective date of such change.

B. Local, State and National Services

The Board agrees to deduct from teachers' salaries money for local, state and/or national association services and programs as said teachers individually and voluntarily authorize the Board to deduct and to transmit the monies promptly to such association or associations. Any teacher may have such deductions discontinued at any time upon sixty (60) days written notice to the Board and the appropriate association.

Article XXXIII, *Miscellaneous Provisions*

A. Nondiscrimination

The Board agrees that there shall be no discrimination, and that all practices, procedures, and policies of the school system shall clearly exemplify that there is no discrimination in the hiring, training, assignment, promotion, transfer, or discipline of teachers or in the application or administration of this Agreement on the basis of race, creed, color, religion, national origin, sex, domicile, marital status, age or sexual orientation.

A. The Supreme Court has held that grievances alleging racial discrimination are not arbitrable. **Teaneck, 94 N.J.** 9 (1983). Such complaints may only be pursued through state or federal agencies. However, PERC has recently ruled that a grievance alleging political

B. Board Policy

This Agreement constitutes Board policy for the term of said Agreement, and the Board shall carry out the commitments contained herein and give them full force and effect as Board policy.

C. Savings Clause

Except as this agreement shall otherwise provide, all terms and conditions of employment applicable on the effective date of this Agreement to employees covered by this Agreement as established by the administrative procedures and practices in force on said date, shall continue to be so applicable during the terms of this agreement. Unless otherwise provided in this Agreement, nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce, or otherwise detract from any teacher benefit existing prior to its effective date.

D. Separability

If any provision of this Agreement or any application of this Agreement to any employee or group of employees is held to be contrary to law, then such provision or application shall not be deemed valid and subsisting, except to the extent permitted by law, but all other provisions or applications shall continue in full force and effect.

E. Compliance between Individual Contract and Master Agreement

Any individual contract or job description between the Board and an individual teacher, heretofore or hereafter executed, shall be subject to and consistent with the terms and conditions of this Agreement. If an individual contract or job description contains any language inconsistent with this Agreement, this Agreement shall be controlling.

F. Printing Agreement

Copies of this Agreement shall be printed at the expense of the Board after agreement with the Association on format within thirty (30) days after the Agreement is signed. The Agreement shall be presented to all teachers now employed, hereafter employed, or considered for employment by the Board.

G. Notice

Whenever any notice is required to be given by either of the parties to this

discrimination in a failure to reappoint an employee could proceed to arbitration. **Township of Wayne,** PERC No. 87-82.

Paragraph B. is a superfluous paragraph that simply states that the board must carry out the commitments contained in the contract and gives them the effect of board policy. It is, of course, the intention of the board, as well as the association, to adhere to the provisions of the contract.

C. This is commonly called a "past practice" clause. Such a clause can be extremely detrimental to the board. If included in the contract, the result could be to freeze in place all existing "rights" and "benefits" provided anywhere in the district, whether through board policy, administrative regulation, district practice, or even the practices of individual administrators. The union seeking such a clause should be asked to specify which rights and benefits it seeks to guarantee by this clause. That question may result in a withdrawal of the demand, if the union is unable to describe any real concerns. On the other hand, the answer may convince the board of the danger of such a clause and result in a rejection of the proposal.

D. This is a standard clause.

This is a standard clause. The board has the authority to establish job descriptions unilaterally, but they must be in compliance with the terms of the negotiated agreement.

F. The cost of printing the agreement is usually shared by the board and the union. It is absurd to agree to give a copy of the agreement to every teacher being considered for employment by the board.

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Agreement to the other, pursuant to the provision(s) of this Agreement, either party shall do so by telegram or registered letter at the following addresses:

1. If by Association, to Board at
(address)
2. If by Board, to Association at
(address)

Article XXXIV, *Duration of Agreement*

A. Duration Period

This Agreement shall be effective as of **[Date of Implementation]** and shall continue in effect until **[Date of expiration]** ,

[NOTE—In Agreements which extend for more than one (1) year and negotiations over fiscal matters are to be conducted annually, insert the phrase:

subject to the Association's right to negotiate each annual budget with negotiations commencing no later than October 1 of each year, under procedures defined in ARTICLE II, and . . .]

subject to the Association's right to negotiate over a successor Agreement as provided in ARTICLE II. This Agreement shall not be extended orally, and it is expressly understood that it shall expire on the date indicated, unless it is extended in writing.

B. Status of Incorporation

Option 1 [For Incorporated Local Association]

In witness whereof the parties hereto have caused this Agreement to be signed by their respective presidents, attested by their respective secretaries, and their corporate seals to be placed hereon, all on the day and year first above written.

ASSOCIATION	BOARD OF EDUCATION
By	By
Its President	Its President
By	By
Its Secretary	Its Secretary

Option 2 [For Unincorporated Local Association]

In witness whereof the parties hereto have caused this Agreement to be signed by president and secretary and the Board has caused this Agreement to be signed by its president, attested by its secretary and its corporate seal to be placed hereon, all on the day and year first above written.

ASSOCIATION	BOARD OF EDUCATION
By	By
Its President	Its President
By	By
Its Secretary	Its Secretary

Article , *Representation Fee*

A. Purpose of Fee

If an employee* does not become a member of the Association during any membership year (i.e., from September 1 to the following August 31), which is covered in whole or in part by this Agreement, said employee will be required to pay a representation fee to the Association for that membership year. The purpose of this fee will be to offset the employee's per capita cost of services rendered by the Association as majority representative.

*Use the appropriate term to designate all members included in the bargaining unit.

If the contract is going to exist for a particular period of time, but certain specific items, e.g., salaries, are to be negotiated during the remainder of the contract, it should be specifically so stated in a reopener clause. The Sample Agreement language on reopener clause refers to "each annual **budget,**" which is totally inappropriate. If it stated "over salary" or "over economic benefits" it would be more acceptable. October 1 is too early for salary negotiations to occur in most districts. PERC's regulations direct boards to commence negotiations 120 days prior to school budget elections. This provides more than enough time to negotiate a successor agreement.

The constitutionality of New Jersey's agency shop law has been upheld in Federal and state courts. Therefore, a board is obligated to bargain over the issue, upon requests by the union, but need not concede. Boards contemplating agreement on this benefit should carefully read the following analysis.

The first sentence suggests that, even if an agreement containing an agency shop provision were in effect for only a portion of the school year, a non-member employee would have to pay a representation fee for the entire school year.

In fact, use of the term "membership year," defined as September 1 to August 31, implies that a contract that is effective on July 1, 1983 and which contains an agency shop clause may be entitling the union to collect agency shop fees for the **previous school year.** Since the membership year extends to August 31, 1983, the contract with the agency shop clause covers that membership year "in part," and retroactive payment may be due.

To avoid this, boards should insist that representation fees be deducted **prospectively only,** beginning either with July 1 or September 1.

The second sentence describes the purpose of the fee, but also should cite, in the interests of thoroughness, those excluded union activities for which fee payment is not required, i.e., partisan, political activities or causes or ideological positions only incidentally related to terms and conditions of employment, and all benefits available only to members of the majority representative.

B. Amount of Fee

1. Notification

Prior to the beginning of each membership year, the Association will notify the Board, in writing, of the amount of the regular membership dues, initiation fees and assessments charged by the Association to its own members for that membership year. The representation fee to be paid by non-members will be equal to 85% of that amount.

PERC has determined that the size of the representation fee is a matter to be determined by the union, subject to appeal by the employee to the appropriate bodies (see below), and is therefore a non-negotiable topic. **Woodbridge,** PERC No. 81-131. The preferred language in the last sentence is "will not exceed 85% . . . " since the actual fee will vary among different unions according to what percent of their dues are used for collective bargaining purposes in any year covered by the representation fee clause.

The contract should also state:

The Association will certify to the Board prior to the start of each membership year that the amount of the representation fee to be assessed does not exceed 85% of dues, fees and assessments and does not include any amount of dues, fees and assessments that are 1) expended for partisan, political or ideological activities or causes that are only incidentally related to terms and conditions of employment or 2) applied toward the cost of benefits available only to members of the majority representative.

2. Legal Maximum

In order adequately to offset the per capita cost of services rendered by the Association as majority representative, the representation fee should be equal in

This clause contains a contingency provision, which would change the

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amount to the regular membership dues, initiation fees and assessments charged by the Association to its own members, and the representation fee has been set at 85% of that amount solely because that is the maximum presently allowed by law. If the law is changed in this regard, the amount of the representation fee automatically will be increased to the maximum, said increase to become effective as of the beginning of the Association membership year immediately following the effective date of the change.

maximum amount of representation fee payment from 85% to some higher figure. It is recommended that school boards **not** agree to this language because it is based upon an anticipated change in the law. Such "if/then" clauses have been found to be illegal by PERC. **Hoboken,** PERC No. 82-7.

C. Deduction and Transmission of Fee

1. Notification

Once during each membership year covered in whole or in part by this agreement, the Association will submit to the Board a list of those employees who have not become members of the Association for the then current membership year. The Board will deduct from the salaries of such employees, (in accordance with paragraph 2 below), the full amount of the representation fee and promptly will transmit the amount so deducted to the Association.

C. 477, P.L. 1979, requires that no representation fee deduction can be made unless the majority representative first establishes a demand and return system. This system provides that a non-union member may appeal the amount of the representation fee assessed against him/her. The union must provide the non-member with a full and fair hearing, and has the burden of proof in justifying the amount of the fee. Non-members who are dissatisfied with the outcome of their appeal at the local level may appeal to a three-member Tripartite State Board. Language should be negotiated requiring the majority representative to provide evidence of the existence of this system to the public employer and to all non-union members, before any deductions are made.

2. Payroll Deduction Schedule

The Board will deduct the representation fee in equal installments, as nearly as possible, from the paychecks paid to each employee on the aforesaid list during the remainder of the membership year in question. The deductions will begin with the first paycheck paid;

(a) 10 days after receipt of the aforesaid list by the Board; or

(b) 30 days after the employee begins his or her employment in a bargaining unit position, unless the employee previously served in a bargaining unit position and continued in the employ of the Board in a non-bargaining unit position or was on layoff, in which event the deductions will begin with the first paycheck paid 10 days after the resumption of the employee's employment in a bargaining unit position, whichever is later.

The law establishes a minimum period that must elapse before non-union employees who enter the bargaining unit for the first time or who re-enter the bargaining unit must pay a representation fee. School boards could seek to negotiate periods longer than the thirty and ten day minimum periods stated in this section.

3. Termination of Employment

If an employee who is required to pay a representation fee terminates his or her employment with the Board before the Association has received the full amount of the representation fee to which it is entitled under this Article, the Board will deduct the unpaid portion of the fee from the last paycheck paid to said employee during the membership year in question.

This should be agreed to only if the board must deduct the unpaid portion of the union dues from the last paycheck paid to union members during the membership year in question.

4. Mechanics

Except as otherwise provided in this Article, the mechanics for the deduction of representation fees and the transmission of such fees to the Association will, as nearly as possible, be the same as those used for the deduction and transmission of regular membership dues to the Association.

5. Changes

The Association will notify the Board in writing, of any changes in the list provided for in paragraph 1 above and/or the amount of the representation fee, and such changes will be reflected in any deductions made more than 10 days after the Board received said notice.

6. New Employees

On or about the last day of each month, beginning with the month this agreement

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becomes effective, the Board will submit to the Association, a list of all employees who began their employment in a bargaining unit position during the preceding 30 day period. The list will include names, job titles and dates of employment for all such employees.

D. Indemnification and Save Harmless Provision

1. Liability

The Association agrees to indemnify and hold the Board harmless against any liability which may arise by reason of any action taken by the Board in complying with the provisions of this Article, provided that:

(a) the Board gives the Association timely notice in writing of any claim, demand, suit or other form of liability in regard to which it will seek to implement this paragraph; and

(b) if the Association so requests in writing, the Board will surrender to it full responsibility for the defense of such claim, demand, suit or other form of liability and will cooperate fully with the Association in gathering evidence, securing witnesses, and in all other aspects of said defense.

2. Exception

It is expressly understood that paragraph 1 above will not apply to any claim, demand, suit or other form of liability which may arise as a result of any type of willful misconduct by the Board or the Board's imperfect execution of the obligations imposed upon it by this Article.

This "Indemnification" language has been offered by teacher unions in some districts as an assurance that the board will not incur any cost if sued by an irate employee forced to pay a representation fee. The language, however, seems to lack the clarity the board should demand; e.g., the meaning of paragraph 2 is ambiguous enough to make the entire provision meaningless. Additionally, the clause asks the board to surrender all responsibility for its own defense to the association, a delegation that most boards would find unacceptable.

The board should insist that it be fully indemnified against financial liability arising out of, or by reason of, any action taken or not taken in conformance with an agency shop clause. Such a clause might read as follows:

> *The union shall indemnify and hold the employer harmless against any and all claims, demands, suits and other forms of liability, including liability for reasonable counsel fees and other legal costs and expenses, that may arise out of, or by reason of any action taken or not taken by the employer in conformance with this provision.*

NEW JERSEY SCHOOL BOARDS ASSOCIATION
P.O. Box 909, Trenton, New Jersey 08605-0909